SUPREME COURT
OF THE UNITED STATES

No. 09-1343
Title: J. McIntyre Machinery, Ltd., Petitioner
v
Robert Nicastro, Individually and as Administrator of the Estate of Roseanne Nicastro
Docketed: May 5, 2010
Lower Ct Case Nos.: (A-29 September Term 2008)
Decision Date: February 2, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
May 3 2010	Petition for a writ of certiorari filed. (Response due June 4, 2010)
May 12 2010	Waiver of right of respondents Robert Nicastro, et ux. to respond filed.
May 14 2010	Letter proposing a lodging consisting of a declaration of counsel with three exhibits related to petitioner's current status in liquidation proceedings in the United Kingdom received from counsel for petitioner.
May 25 2010	DISTRIBUTED for Conference of June 10, 2010.
Jun 8 2010	Response Requested. (Due July 8, 2010)
Jun 17 2010	Order extending time to file response to petition to and including August 9, 2010.
Aug 2 2010	Brief of respondents Robert Nicastro, et ux. in opposition filed.
Aug 16 2010	DISTRIBUTED for Conference of September 27, 2010.
Aug 16 2010	Reply of petitioner J. McIntyre Machinery, Ltd. filed. (Distributed)
Sep 28 2010	Petition GRANTED. The case is to be argued in tandem with No. 10-76, Goodyear Luxembourg Tires v. Brown.
Oct 13 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Oct 15 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 8 2010	SET FOR ARGUMENT ON Tuesday, January 11, 2011.
Nov 12 2010	Brief of petitioner J. McIntyre Machinery, Ltd. filed.
Nov 12 2010	Joint appendix filed.
Nov 19 2010	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Nov 19 2010	Brief amicus curiae of Dow Chemical Canada ULC filed.
Nov 19 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Nov 19 2010	Brief amici curiae of Organization for International Investment and Association of International Automobile Manufacturers Inc. filed.
Nov 26 2010	CIRCULATED.
Dec 13 2010	Brief of respondents Robert Nicastro, et ux. filed. (Distributed)
Dec 17 2010	Brief amicus curiae of American Association for Justice filed. (Distributed)
Dec 17 2010	Brief amicus curiae of Workers' Injury Law & Advocacy Group filed. (Distributed)
Dec 20 2010	Record received from Supreme Court of New Jersey. (1 box)
Dec 20 2010	Brief amici curiae of Arkansas, et al. filed. (Distributed)
Dec 20 2010	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Dec 20 2010	Brief amici curiae of Law Professors filed. (Distributed)
Jan 4 2011	Reply of petitioner J. McIntyre Machinery, Ltd. filed. (Distributed)
Jan 4 2011	Motion to substitute party filed by respondent Robert Nicastro.
Jan 11 2011	Argued. For petitioner: Arthur F. Fergenson, Ellicott City, Md. For respondent:

Alexander W. Ross, Jr., Marlton, N. J.

Jan 18 2011 Motion DISTRIBUTED for Conference of January 21, 2011

Jan 24 2011 Motion to substitute party GRANTED.

Supreme Court, U.S.
FILED

091343 MAY 3 - 2010

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No. 09-

IN THE

Supreme Court of the United States

J. Mc INTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a "new reality" of "a contemporary international economy" permit a state to exercise, consonant with due process under the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream–of–commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

LIST OF PARTIES

Petitioner J. McIntyre Machinery, Ltd. is company organized and existing under the laws of the United Kingdom. Its principal place of business is in Nottingham, England.

Respondents Robert and Roseanne Nicastro, husband and wife, are residents of the State of New Jersey.

Defendant McIntyre Machinery America, Ltd. filed for bankruptcy in 2001 and has not participated in this action.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner is a company formed under the laws of the United Kingdom. Petitioner is not a publicly traded company and no publicly traded company owns 10% or more of Petitioner's equity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The February 2, 2010 opinion of the Supreme Court of New Jersey is reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), and is reprinted in the Appendix (App.) at 1a. The Supreme Court of New Jersey affirmed the April 9, 2008 decision of the Superior Court of New Jersey, Appellate Division, reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super. 539, 945 A.2d 92 (App. Div. 2008), and reprinted at App. 73a. The New Jersey Appellate Division reversed the unpublished November 3, 2006 decision and order of the New Jersey Superior Court, Law Division granting Petitioner's motion to dismiss for lack of personal jurisdiction, reprinted at App. 111a. In its unpublished decision dated May 26, 2005, reprinted at App. 154a, the New Jersey Appellate Division reversed (and remanded for jurisdictional discovery) the March 5, 2004 decision and order of the New Jersey Superior Court, Law Division granting Petitioner's first motion to dismiss for lack of personal jurisdiction, reprinted at 160a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Supreme Court of New Jersey's opinion was rendered on February 2, 2010, and the issue of personal jurisdiction over Petitioner consistent with the Due Process Clause of the 14th Amendment to the United States Constitution is not subject to further review in the courts of the State of New Jersey. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment XIV, Section 1, Clause 3:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION

In a sweeping departure from this Court's due process jurisprudence, a divided New Jersey Supreme Court held that, in light of a purported "radical transformation of today's global market," a manufacturer anywhere in the world is now subject to *in personam* jurisdiction in a products liability action in New Jersey state court under the stream-of-commerce theory if that defendant targets the United States economy for the sale of its product and it is purchased by a New Jersey consumer. Although New

Jersey is but one state, the impact of this decision resonates far beyond its borders. New Jersey has 8.7 million people,[1] consumers all, who buy products manufactured across the world. By this decision, New Jersey will exercise worldwide jurisdiction, without constitutional limits. The decision is wrong and the impact is profound.

STATEMENT OF THE CASE

1. This petition arises from a products liability action in which Respondent Robert Nicastro alleges that he was injured on October 11, 2001, while using a three-ton shear machine manufactured by Petitioner J. McIntyre Machinery, Ltd. ("J. McIntyre") in the course of his employment with Curcio Scrap Metal, Inc. in Saddle Brook, New Jersey. On September 22, 2003, Mr. Nicastro, with his wife Roseanne in consortium, filed this action in the Superior Court of New Jersey against J. McIntyre and an unaffiliated distributor called McIntyre Machinery of America, Inc. ("MMA") located in Stow, Ohio. On December 22, 2003, J. McIntyre answered the complaint and soon thereafter raised the defense by motion to dismiss that the New Jersey court lacked personal jurisdiction over it.

The allegedly involved shear machine appears to have been manufactured by J. McIntyre in 1995 in Nottingham, England. It was then sold and shipped to MMA in Ohio. J. McIntyre and MMA were distinct

1. *See* U.S. Census Bureau, State and County Quick Facts for New Jersey, web page at http://quickfacts.census.gov/qfd/states/34000.html.

corporate entities, independently operated and controlled, and without any common ownership. J. McIntyre had no written contract or agreement with MMA other than the invoices that accompanied the J. McIntyre products purchased by MMA.

The owner of Curcio Scrap Metal, Frank Curcio, attended a scrap metal recycling industry convention in Las Vegas, Nevada in 1994 or 1995 where he visited MMA's demonstration booth. In 1995, Curcio purchased the shear machine from MMA in Ohio. The machine was shipped from MMA's headquarters in Stow, Ohio to Saddle Brook, New Jersey. The invoice for the purchase instructed Curcio to make a check payable to "McIntyre Machinery of America, Inc."

On March 5, 2004, the trial court granted J. McIntyre's motion and dismissed the Complaint for lack of personal jurisdiction, finding that J. McIntyre did not have sufficient contacts with New Jersey to justify the exercise of jurisdiction over it. The trial court held that under even the most liberal accepted form of the stream–of–commerce theory, J. McIntyre would not be subject to jurisdiction in New Jersey. (App. 170a-171a).

2. Respondents appealed to the Superior Court of New Jersey, Appellate Division. On May 26, 2005, the Appellate Division opted not to decide the merits, but remanded the case to the trial court for jurisdictional discovery. (App. 156a-157a). After Respondents conducted jurisdictional discovery, J. McIntyre again moved, on September 11, 2006, to dismiss the complaint for lack of personal jurisdiction.

3. On November 3, 2006, the trial court granted J. McIntyre's motion and again dismissed Respondents' complaint for lack of personal jurisdiction, finding that despite jurisdictional discovery, no evidence was presented to support the exercise of personal jurisdiction over J. McIntyre. (App. 130a). The trial court held that J. McIntyre was not subject to personal jurisdiction in New Jersey because there was no basis to conclude that J. McIntyre had any expectation that one of its products would be sold and shipped to New Jersey. (*Id.*)

4. Respondents again appealed to the New Jersey Superior Court, Appellate Division. On April 9, 2008, the New Jersey Appellate Division reversed the trial court's decision, holding J. McIntyre satisfied the "stream-of-commerce plus" test articulated by Associate Justice Sandra Day O'Connor in *Asahi Metal Indus. Co. v. Sup. Court*, 480 U.S. 102, 112 (1987), because: 1) J. McIntyre does business in the United States through a single distributor; and 2) New Jersey is one of the fifty United States and, thus, a possible location for end users of its products. (App. 105a-106a). J. McIntyre timely petitioned the New Jersey Supreme Court for review by certification.

5. On February 2, 2010 the New Jersey Supreme Court upheld the Appellate Division's finding of personal jurisdiction. In a decision that begins with the sentence, "[t]oday, all the world is a market," a five-justice majority found that although J. McIntyre had none of the traditional minimum contacts with New Jersey for purposes of jurisdictional analysis, and was not involved in the sale of the product, it was

nevertheless amenable to jurisdiction in the state. (App. 1a, 14a, 38a). The court found that because J. McIntyre sold products in the United States generally through a single unaffiliated distributor, it was engaged in what the court deemed to be a "distribution scheme" that targeted the "entire United States, including New Jersey." (App. 39a-40a). The court stated that "by targeting the United States economy for the sale of its products," J. McIntyre knew or reasonably should have known that this "distribution scheme" would "make the subject shear machine available to a New Jersey consumer." That was enough, held the court, to allow New Jersey state courts to exercise jurisdiction without violating the Due Process Clause of the United States Constitution. (App. 40a-41a). In finding jurisdiction over J. McIntyre, the Court expressly premised its finding upon a judicially-noticed global economy "driven by startling advances in transportation of products and people and instantaneous dissemination of information." (App. 14a-15a). Claiming New Jersey's strong interest in protecting its citizens from presumptively defective products, the court contended that traditional notions of fair play and substantial justice in a jurisdictional analysis should reflect what it termed "the radical transformation of the international economy." (App. 35a). The case was remanded to the trial court.

6. Petitioner will apply to this Court, pursuant to Rule 32.3, for leave to lodge an affidavit to place before this Court the following facts of the current status of J. McIntyre, facts not present in the record: On April 22, 2009, J. McIntyre filed for Administration in the United Kingdom under the Insolvency Act 1986 and is presently in liquidation proceedings. Respondents filed proofs of

unliquidated monetary claims in those proceedings. The liquidation proceedings remain pending and dissolution has not been sought.

REASONS FOR GRANTING THE PETITION

I. Using The "Global Marketplace" As A Premise For Limitless Jurisdiction Eliminates Constitutional Protections For Foreign Manufacturers With No Connection To The Forum State That Seek To Enter The United States Market.

As the conceptual foundation for its new stream–of–commerce theory, the Supreme Court of New Jersey took judicial notice of an un-qualified and unexplained notion: the "global marketplace." *Nicastro*, 201 N.J. at 72, 987 A.2d at 589 ("In the twenty-two years since *Asahi Metal Indus. Co. v. Sup. Court*, 480 U.S. 102, 112 (1987), transnational commerce has accelerated and we realize more than ever that we live in a global marketplace."). (App 31a). The court determined that mere participation in the United States segment of the global economy, where such participation culminates in the purchase of a single product by a New Jersey consumer, is sufficient basis for jurisdiction to meet the due process requirements of the Constitution. Nothing "discovered" by the New Jersey Supreme Court warrants the abandonment of the protections afforded all persons who face suit in our Nation's state courts. Yet that is precisely what this decision accomplishes.

A. "Global Commerce" Has Not Fundamentally Changed the Distribution and Sale of Products.

Despite the stated importance to the lower court's holding, the judicially–noticed theme of the "global marketplace" was not explored or explained, much less given the heft of even the barest of evidentiary support. Unbothered by its lack of critical analysis or real information, the lower court necessarily assumed that the current status of international trade is such that large industrial machinery now flows more quickly and readily through new, previously un-realized channels. In the real world products small and large, including heavy machinery such as the shear machine at issue (manufactured and sold 15 years ago), travel across borders as they always have: they are shipped. While the United States is certainly part of an international economy, the basic methods of selling and transporting goods are the same as they were in the time of *Asahi*, *supra*, and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Nevertheless, believing that increased international economic activity somehow equates to a metaphysical change in the nature of product transportation and distribution, the lower court was content to vaguely designate the economy's "radical transformation" as grounds for an equally radical expansion of the parameters of personal jurisdiction.

The modern economy has always been global, and foreign manufacturers have been doing business in the United States since the 19th century. Commentators, including those cited by the lower court and Respondents in the proceedings below, describe the

movement as occurring over the last 200 years, not the last 20. *See* Friedman, *The World Is Flat*, 9-10, Farrar, Straus and Giroux, 2006; Licht, *Industrializing America: The Nineteenth Century* 133 (1995). Society's collective ability to communicate and transfer information through electronic means may have accelerated in recent years, and tangible consumer goods can often be ordered and shipped more rapidly to their destinations, but the conduits through which goods travel are essentially no different than they were 50 years ago. This is best illustrated by the case at hand. Here the three-ton shear machine at issue was ordered by telephone and shipped overland from MMA's Ohio facility to Curcio Scrap Metal in New Jersey, a common form of shipment used today as it has for decades. Today, as in yesteryear, products are shipped to their final destinations by air, sea, rail, or road.

Moreover, to pretend that this case exemplifies some unprecedented tide of foreign products infiltrating New Jersey without quarter, such that its courts must abandon any semblance of constitutional due process, ignores that New Jersey has always been a portal state. International trade has long figured prominently in state and national economies. Insofar as it is used by the majority to usher in a new jurisdictional theory, the "globalization" term is an empty set.

B. In Finding Jurisdiction Over Any Manufacturer Whose Product Is Sold To A New Jersey Purchaser, New Jersey's High Court Places New and Severe Burdens on International and United States Commerce.

The rule established by the lower court creates a new and substantial burden on United States and international manufacturers. The impact on trade is potentially enormous. Now, any individual or entity, no matter how small, making products anywhere in the United States or abroad that are purchased by a New Jersey consumer, may be forced to defend a lawsuit there.

As this Court has observed, a coherent and reasonable jurisdictional theory is necessary for participants in our national economic life, a core consideration in any jurisdictional analysis. *See World-Wide Volkswagen*, 444 U.S. at 292-293.[2] Over the course of our economy's growth and expansion, jurisdictional analysis has always required that nonresident defendants be given "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in

2. "The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *See World-Wide Volkswagen*, 444 U.S. at 293 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949)).

judgment)). A court's jurisdictional determination, consistent with due process, "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This "predictability" allows entities doing business within our country's borders to have true as opposed to imputed or constructive awareness of the possible risks their primary conduct will entail. Where jurisdiction is based upon the defendant's own forum-directed conduct, the "fair notice" requirement is satisfied and, in the truest sense, a lawsuit in the forum cannot be unexpected. *See Burger King*, 471 U.S. at 472.

The lower court forgets these lessons, and the impact is profound not only on foreign citizens, but also on American citizens. Now, no American individual, entity or enterprise can manufacture products anywhere without the prospect of being subject to the vicissitudes of litigation in a New Jersey court.

Consider the following hypothetical. A candle maker in Alaska starts a small candle business in Anchorage. His candles are large and can be used in most homes anywhere. He has no developed marketing or sales plan as of yet, but is interested in selling as many candles as he can. His friend in Seattle, Washington has a gift store and they have agreed to an arrangement in which the friend will sell the candle maker's products in Seattle. A New Jersey man vacations in Seattle, visits the shop and orders one of the larger candles, which the

shopkeeper agrees to ship to his home in New Jersey. The Alaskan candle maker is never informed of this sale. The day the candle arrives, the New Jersey man opens the package and lights the candle. A short time later, the candle improperly melts and a fire starts, consuming the house and injuring the man's family. The New Jersey man sues the candle maker for damages in his state court alleging product defect. Though the candle maker had no connection to New Jersey and he exhibited no intention, actions, or awareness that his product would be sold and shipped to someone there, under the lower court's holding the candle maker is nevertheless amenable to jurisdiction and is now forced to defend the lawsuit in New Jersey. That result, now sanctioned by the New Jersey Supreme Court, violates the Alaskan candle maker's due process rights guaranteed by the Constitution and is offensive to "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

C. The Lower Court's Holding Erroneously Requires That Due Process Must Yield to Globalization.

The lower court contends that because the United States economy is part of a "global" whole, there should no longer be any impediments to New Jersey courts exercising personal jurisdiction over a foreign defendant, regardless of that defendant's lack of awareness or directed activity toward the state. *Nicastro*, 201 N.J. at 79, 987 A.2d at 593. (App. 40a). However, to the extent the court has formulated a new

expansion that is informed by or premised on the "global marketplace," its ruling must still comply with the Constitution's due process requirements, which it does not. As stated by Justice Hoens in her dissent, the majority's repeated allusion to the "global marketplace" cannot mask the fact that its ruling "stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point." *Id.* at 82, 987 A.2d at 594-95 (J. Hoens, dissenting). (App. 45a).

As life in the United States and the world has changed, this Court's analytical framework for determining the scope of personal jurisdiction over a foreign defendant has endeavored to keep pace, while always preserving a defendant's right to due process. This Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), began an expansion of a state's ability to exercise jurisdiction over foreign defendants. As early as 1957, this Court attributed this expansion "to the fundamental transformation of our national economy," *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957), a notion that was again considered in *World-Wide Volkswagen*, 444 U.S. at 293 ("[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.").

Even in light of the ever-progressing state of technology and economic conditions, the constitutional principle underlying *International Shoe* and its progeny is that a nonresident cannot be subjected to jurisdiction unless he has purposefully established a connection with the forum. *See Burger King Corp.*, 471 U.S. at 474. As

stated by the Sixth Circuit in *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996):

> The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able "to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit."

Id. at 1262 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

While cognizant of economic progress and a changing world, this Court's treatment of personal jurisdiction has continued to focus on whether a defendant has some minimally-directed activity, contacts with, or specific awareness of its products in the forum state such that requiring the defendant to answer a suit there is consistent with due process. *See Asahi*, 480 U.S. at 112, 117; *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297. The lower court's opinion is a direct assault on the importance of state sovereignty in a jurisdictional analysis. For its new jurisdictional test, the lower court eliminates state lines, for its holding is starkly simple: the United States equals each state. Yet, this Court has held otherwise. *See World-Wide Volkswagen*, 444 U.S. at 293 ("we have never accepted

the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

Nor was the lower court bashful about the controversial nature of its ruling, speaking with a breathtaking candor that suggests that it was expecting and even inviting, review by this Court:

> [W]e discard outmoded constructs of jurisdiction in product liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.

Nicastro, 201 N.J. at 75-76, 987 A.2d at 591. (App. 35a). To this implicit invitation, the dissenters added their own plea for this Court to take review of this case. (App. 70a, 72a).

Whatever the lower court means by "outmoded constructs of jurisdiction," the consequence is plain: it has "discarded" the always–present protections of due process in its eagerness to create a New Jersey market for lawsuits directed to manufacturers where ever they might be.

II. The Lower Court's Stream-Of-Commerce Theory Is Not Grounded In This Court's Due Process Jurisprudence.

A finding of personal jurisdiction under the stream-of-commerce approach can properly rest only upon a finding of some purposeful conduct, knowledge or awareness by the defendant such that an exercise of jurisdiction over it would not offend traditional notions of fair play and substantial justice. *See Asahi*, 480 U.S. at 112, 117; *World-Wide Volkswagen*, 444 U.S. at 298. Until now, a defendant's single act of placing an allegedly defective product into the stream-of-commerce outside the forum, without more, has never been enough to confer jurisdiction. The lower court renders any specific intent or knowledge of the role of a particular state in a distribution, sales, or marketing effort totally irrelevant to the jurisdictional determination. This is a complete departure from this Court's precedents.

A. This Court Requires More Than a State Merely Being Part of this Union to Qualify as a Constitutionally-Appropriate Forum.

1. *World Wide Volkswagen's* requirement of a defendant's purposeful activity

This Court first articulated the stream-of-commerce theory in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286. In *World-Wide Volkswagen*, the issue was whether an Oklahoma court could exercise personal jurisdiction over an automobile retailer and wholesaler, both New York corporations, in a products liability action. *Id.* at 288-289. The defendants' only

contact with Oklahoma was through the sale of a car to a non-resident consumer in New York, who then drove the car to Oklahoma where the subject accident occurred. *Id.* This Court found no "efforts [by defendants] to serve, directly or indirectly, the market for its product in [Oklahoma]," *id.* at 298, and held that defendants could not be subjected to personal jurisdiction where their alleged contacts with the forum state were based on the unilateral act of the consumer and not on any act of their own. *Id.* at 298.

The *World-Wide Volkswagen* plaintiffs argued that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that the [subject automobile] would cause injury in Oklahoma." *Id.* at 295. This Court rejected the argument, confirming that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* This Court then stated, however, that foreseeability is not "wholly irrelevant:"

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297.

This Court went on to hold that the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a

corporation that delivers its products into the stream-of-commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 298. Thus, *World-Wide Volkswagen* made plain that jurisdiction under a stream-of-commerce framework cannot be based solely upon the foreseeable unilateral actions of a consumer, but rather, must rest on the quality of the defendant's activities directed toward the forum, such that a reasonable expectation of a lawsuit in that state could not come as a surprise. *Id.* Then, as now, the proper focus was on the defendant's behavior.

2. *Asahi's* emphasis on a defendant's activities toward the forum and reasonable expectation of suit

This Court again reviewed the stream–of–commerce theory in its plurality opinions in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). *Asahi* arose from a products liability case following a motorcycle accident in California. The injured plaintiff alleged that the motorcycle tire, tube and sealant were defective. *Id.* at 105-06. Plaintiff sued the Taiwanese manufacturer of the tube, which in turn filed a cross-complaint for indemnification from Asahi Metal Industry Company, the Japanese component manufacturer of the tube's valve assembly. *Id.* at 107. Asahi had no offices, property, or agents in the forum state, solicited no business and made no direct sales in the state, and did not design or control the system of distribution that brought its product into the forum state. *Id.* at 108. Asahi challenged personal jurisdiction in California.

All nine Justices agreed that the California courts could not exercise personal jurisdiction over Asahi because to do so would not comport with traditional notions of fair play and substantial justice as due process requires. The Justices, however, did not agree on the scope of the stream–of–commerce theory or whether minimum contacts existed on the facts presented.

Four Justices joined in an opinion authored by Justice O'Connor. This plurality stated: ". . . a defendant's awareness that the stream-of-commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. In Justice O'Connor's opinion, "[t]he placement of a product into the stream-of-commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Additional conduct of the defendant could include designing a product particularly for the forum state, advertising in the forum state, establishing service channels for customers in the state, or marketing through a sales agent in the forum state. *Id.* Because there was no showing of additional conduct by Asahi, this plurality found Asahi's contacts with California insufficient for the exercise of personal jurisdiction.

Four other Justices joined in a plurality opinion authored by Associate Justice William J. Brennan, Jr., rejecting the "additional conduct" requirement:

> The stream-of-commerce refers not to unpredictable currents or eddies, *but to the regular and anticipated flow of products* from

> manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being *marketed* in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id. at 117 (emphases added). This plurality concluded that because Asahi was aware of the distribution system that brought its products into California, there were sufficient minimum contacts. *Id.* at 121.

Despite their dispute over the scope of the stream–of–commerce theory, both pluralities agreed that a finding of minimum contacts requires some species of purposeful availment by the defendant toward the forum state. *Id.*; *see also Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) (under either *Asahi* view, the contact must be purposeful, rather than incidental). In *Asahi*, the two pluralities differed in their respective approach but agreed that due process requires the defendant to have engaged in some minimal activity directed toward the forum. Justice Brennan focused on actual awareness by the defendant that the product was being marketed in the forum state, while Justice O'Connor required additional indicia of purposefully directed activity. In each approach, more than merely depositing a product into the stream-of-commerce and having it unpredictably end up in any state in the Union is required.[3]

3. In the quarter-century since *Asahi*, a division of opinion as to the proper scope of the stream–of–commerce theory has developed. Courts have interpreted *Asahi* to require that a (Cont'd)

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defendant's purposeful acts be directed toward the forum before jurisdiction may be exercised. These courts reject the notion that merely depositing a product in the stream-of-commerce is sufficient to confer jurisdiction over a foreign defendant simply because the product ends up in the forum, even where that defendant is deemed to be aware of that possibility. *See Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-947 (4th Cir. 1994); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-376 (8th Cir. 1990); *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550-551 (7th Cir. 2004); *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 693-694 (8th Cir. 2003); *Vargas v. Hong Jin Crown Corp.*, 247 Mich. App. 278, 636 N.W.2d 291 (Mich. App. 2001); *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, 924 S.W.2d 907, 912 (Tenn. App. 1996); *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 374 (Mo. App. 1997).

Other courts adopt a more permissive approach, consistent with Justice Brennan's requirement of awareness of marketing in the forum state without the need for more. *See Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 418-420 (5th Cir. 1993); *Ex Parte Lagrone v. Norco Indus., Inc.*, 839 So. 2d 620, 627-628 (Ala. 2002); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1362-1364 (Ariz. 1995), *cert. denied*, 516 U.S. 906 (1995); *Grange Ins. Assoc. v. State*, 757 P.2d 933, 938 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 616 (W. Va. 1992), *cert. denied*, 508 U.S. 908 (1993); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 674 (Wis. 2001), *cert. denied*, 534 U.S. 1079 (2002).

Yet another group of courts has expressly decided not to decide the question of how to apply the stream–of–commerce theory under *Asahi's* competing pluralities. These courts instead resolve to decide each case on its own facts, creating a

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Under *World-Wide Volkswagen*, or either of the *Asahi* pluralities, J. McIntyre's mere act of placing the machine into the "stream-of-commerce" outside of New Jersey, without more, is not enough to satisfy the due process requirement necessary for a state to exercise personal jurisdiction. Although a J. McIntyre shear machine may have been purchased by a New Jersey consumer, it cannot be said that J. McIntyre had anything to do with New Jersey's involvement. The lower court has wiped away an entire jurisprudence to reach its intended result: asserting jurisdiction whenever an aggrieved New Jerseyan seeks it in his home court.

Applying an unrestrained stream–of–commerce theory, as the lower court did and *World-Wide Volkswagen* rejected, would create a regime where "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296. This would offer little or no predictability to defendants such that they could be said to have "fair warning" and able to adjust their primary conduct and govern their affairs vis-à-vis the forum. *See Burger King*, *supra*, 472.

(Cont'd)

series of inconsistent results, and no discernable rule. *See Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243-244 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 203-205 (3d Cir. 1998); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993); *Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So.2d 881, 889-890 (La. 1999), *cert. denied*, 528 U.S. 1019 (1999); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 572 (Minn. 2004); *CMMC v. Salinas*, 929 S.W.2d 435, 439-440 (Tex. 1996).

The nearly nine million citizens of New Jersey, just like the citizens of every other state in our Nation, buy and consume goods manufactured from all corners of our country and of the globe. That alone is not, and cannot, be the justification for endowing the New Jersey court system with unrestrained powers to force the world to submit to its sovereignty.

CONCLUSION

For the foregoing reasons, Petitioner J. McIntyre Machinery, Ltd., respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX A OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY
A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v.

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

Argued January 21, 2009 – Decided February 2, 2010

JUSTICE ALBIN delivered the opinion of the Court.

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State. The question before us is

whether the jurisdictional law of this State will reflect this new reality.

In this case, the foreign manufacturer of an allegedly defective and dangerous industrial machine targeted the United States economy for the sale of its product. The machine was sold to a New Jersey business by the manufacturer's exclusive American distributor. An employee of that New Jersey business lost several fingers while using the machine because the machine allegedly lacked a safety guard. The foreign manufacturer knew or reasonably should have known that by placing a product in the stream of commerce through a distribution scheme that targeted a fifty-state market the product might be purchased by a New Jersey consumer. We must resolve whether under those circumstances the manufacturer is subject to the jurisdiction of our State court system in a product-liability action.

We affirm the Appellate Division, which found the New Jersey Superior Court, Law Division, as the proper forum for this action. We also reaffirm our decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, in which we held that "the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." 102 N.J. 460, 480, 508 A.2d 1127 (1986). The increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade and has proven the wisdom

of *Charles Gendler*. Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey. *See id.* at 480-83, 508 A.2d 1127. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice.

I.

A.

On October 11, 2001, plaintiff Robert Nicastro, an employee for thirty years of Curcio Scrap Metal, was operating the McIntyre Model 640 Shear, a recycling machine used to cut metal. Nicastro's right hand accidentally got caught in the machine's blades, severing four of his fingers. The Model 640 Shear was manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a company incorporated in the United Kingdom, and then sold, through its exclusive United States distributor, McIntyre Machinery America, Ltd. (McIntyre America), to Curcio Scrap Metal.

In September 2003, plaintiff named J. McIntyre and McIntyre America as defendants in a product-liability action, *N.J.S.A.* 2A:58C-2, in the Superior Court, Law Division, Bergen County. The complaint alleged that the shear machine manufactured by J. McIntyre and distributed by McIntyre America "was not reasonably

fit, suitable, or safe for its intended purpose."[1] The complaint, in particular, asserted that the machine "failed to contain adequate warnings or instructions," and that its defective design "allow[ed] the plaintiff to become injured while operating the machine in the normal course of his employment." The focus of this product-liability lawsuit, as made clear from plaintiff's expert's report, is that the McIntyre Model 640 Shear did not have a safety guard that would have prevented the accident. Plaintiff is seeking damages for past and future medical expenses, lost wages, and physical pain and suffering.[2]

B.

The trial court granted J. McIntyre's motion to dismiss the action, finding that the English manufacturer did not have sufficient minimum contacts with New Jersey to justify the State's exercise of personal jurisdiction over it. Alternatively, the court held that even under "the most liberal[ly] accepted form of the stream of commerce theory," J. McIntyre "would not be subject to personal jurisdiction in New Jersey."

In an unreported opinion, the Appellate Division reversed, allowing the parties to engage in discovery to

1. Nicastro's wife, Roseann, also a plaintiff, filed a loss-of-consortium claim in the same complaint. For the sake of convenience, we refer only to plaintiff Robert Nicastro.

2. McIntyre America, the distributor, filed for bankruptcy in 2001 and has not participated in this lawsuit.

establish whether New Jersey has the authority to exercise jurisdiction over J. McIntyre on the basis of either a traditional minimum-contacts analysis or the stream-of-commerce theory as articulated in *Charles Gendler* or in Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion).

Here is the relevant information adduced during the discovery period. In either 1994 or 1995, Frank Curcio, the owner of Curcio Scrap Metal of Saddle Brook, New Jersey, attended a trade convention in Las Vegas, Nevada, sponsored by the Institute of Scrap Recycling Industries. While there, he visited the booth of McIntyre America and was introduced to the McIntyre Model 640 Shear.

In 1995, Curcio Scrap Metal purchased the machine from McIntyre America at a cost of $ 24,900. The machine was shipped from McIntyre America's headquarters in Stow, Ohio to Saddle Brook, and the invoice instructed that the check be made payable to "McIntyre Machinery of America, Inc." Affixed to the machine was a label with the following information: "J. McIntyre Machinery," its address, and the model and serial number of the machine. Curcio also received an information sheet listing J. McIntyre's address in Nottingham, England, as well as its telephone and fax numbers. An instruction manual that accompanied the shear machine referenced both United States and United Kingdom safety regulations. Based on

documentation received with the machine, Curcio concluded that "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts."[3]

J. McIntyre's principal place of business is in Nottingham, England, where it designs and manufactures metal recycling machinery and equipment. It holds American and European patents in recycling technology. Michael Pownall, the president of J. McIntyre, attended the scrap metal conventions held in Las Vegas in 1994 and 1995, including the one where Curcio visited the McIntyre America booth. Additionally, from at least 1990 until 2005, J. McIntyre officials, including Pownall, attended trade conventions, exhibitions, and conferences throughout the United States in such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. During the period that McIntyre America was the exclusive United States distributor for J. McIntyre's products, McIntyre America fielded any requests for information about those products at the scrap metal conventions and trade shows in the United States.

3. Curcio's perception, at the time of purchase and today, is in no way altered by a J. McIntyre representative's claim that "[J.] McIntyre does not, and never did, provide maintenance or repair services for its products to businesses or individuals in *New Jersey*." (Emphasis added). The representative did not suggest that J. McIntyre was not servicing its machines in states other than New Jersey.

Appendix A

J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled, without any common ownership. McIntyre America, however, "structured [its] advertising and sales efforts in accordance with [J. McIntyre's] direction and guidance whenever possible."[4] Although J. McIntyre claimed that it sold its machines outright to McIntyre America, the correspondence between the two companies suggests that at least some of the machines were sold on consignment to its American distributor. For example, in a 1999 letter to McIntyre America, J. McIntyre's president noted: "[Y]ou still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full." Indeed, in a 1999 e-mail, McIntyre America reported to J. McIntyre that it had "no problem waiting for [J. McIntyre] to receive payment from the customer first before requesting our commission via a company invoice in the future."[5]

At the conclusion of jurisdictional discovery, the trial court again granted J. McIntyre's motion to dismiss for lack of personal jurisdiction. The court emphasized that J. McIntyre had "no contacts with the state of New Jersey" it did not directly sell or solicit business in this State or have a physical presence here. Not only

4. This remark was set forth in a January 2000 letter from McIntyre America to J. McIntyre.

5. For a more detailed account of the "discovery" evidence, *see Nicastro v. McIntyre Mach. Am.*, Ltd., 399 N.J. Super. 539, 545-48, 945 A.2d 92 (App. Div. 2008).

did the court find no evidence establishing a connection between J. McIntyre and this State, but it also concluded that J. McIntyre had no "expectation that its product would be purchased and utilized in New Jersey." The court maintained that "[t]he fact that [J. McIntyre] may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey." In the court's view, J. McIntyre could be haled into a New Jersey court under the stream-of-commerce theory only if the company engaged in a nationwide distribution scheme that "purposefully brought [J. McIntyre's] shear machines to New Jersey" and the company "purposely availed itself of the protections of [this State's] laws."

II.

In an opinion authored by Judge Lisa, the Appellate Division reversed, concluding that the exercise of jurisdiction by New Jersey "would not offend traditional notions of fair play and substantial justice" and was justified "under the 'stream-of-commerce plus' rationale espoused by Justice O'Connor in *Asahi*." *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 545, 945 A.2d 92 (App. Div. 2008) (citing *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). The panel noted that in *Asahi* two different views of the stream-of-commerce doctrine of jurisdiction were advanced, one by Justice O'Connor and the other by Justice Brennan, with each view supported by four different members of the Court. *Id.* at 555-56, 945 A.2d

92. The panel held that the facts of this case met Justice O'Connor's more restrictive stream-of-commerce plus test, and therefore also satisfied Justice Brennan's framework for jurisdiction in stream-of-commerce cases. *Id.* at 557-58, 565, 945 A.2d 92.

The Appellate Division ultimately found that J. McIntyre not only "plac[ed] the shear machine that injured plaintiff into the stream of commerce by transferring it to its distributor, McIntyre America, with an awareness that its machine might end up in New Jersey, [but] also engaged in additional conduct indicating an intent or purpose to serve the New Jersey market." *Id.* at 558, 564-65, 945 A.2d 92 (citing *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). The Appellate Division identified a number of factors in reaching its determination: (1) J. McIntyre "designated McIntyre America as its exclusive distributor for the entire United States," and did so "for the purpose of selling its machines in all fifty states," *Id.* at 558, 945 A.2d 92; (2) J. McIntyre knew "that McIntyre America was not the end user of the many machines it sold to McIntyre America," *id.* at 559, 945 A.2d 92; (3) when J. McIntyre's management officials attended trade conventions in cities in this country, the company "was engaged in purposeful conduct to avail itself of the entire United States market," *ibid.*; (4) the sale to Curcio of the McIntyre Model 640 Shear "was the result of the very distribution scheme purposefully established by [J. McIntyre] for the sale of its machines to potential customers located anywhere within the exclusive sales territory of McIntyre America," which

included New Jersey, *ibid.*; and (5) J. McIntyre designed the Model 640 Shear "to conform to United States specifications and requirements, and represented such compliance in the instruction manual that came with the machine," *id.* at 564, 945 A.2d 92.

Last, the panel emphasized New Jersey's "strong interest in providing a forum for its injured workers who sustain industrial accidents" and the practical benefits of litigating the case in this State, where the injury occurred and where the evidence and most of the witnesses are located. *Id.* at 565, 945 A.2d 92. The panel also noted that it would not be unreasonable to expect J. McIntyre officials, who have visited this country to promote its products, to travel to this State to respond to claims that one of its defectively designed machines caused serious and permanent injuries to a worker operating it. *Id.* at 565-66, 945 A.2d 92. For those reasons, the Appellate Division had "no hesitancy" in finding J. McIntyre subject to the jurisdiction of the New Jersey Superior Court. *Id.* at 566, 945 A.2d 92.

We granted J. McIntyre's petition for certification. 196 N.J. 344, 953 A.2d 763 (2008). We also granted the motion of the Association of Trial Lawyers - New Jersey to participate in this case as amicus curiae.[6]

6. The Association of Trial Lawyers - New Jersey is now known as the New Jersey Association for Justice.

Appendix A

III.

Defendant J. McIntyre argues that the Appellate Division, in holding it subject to the jurisdiction of the New Jersey court system, did not properly apply Justice O'Connor's "stream-of-commerce plus" test as set forth in *Asahi*. Moreover, J. McIntyre posits that even under Justice Brennan's stream-of-commerce test, a New Jersey court could not assert its jurisdictional authority.

J. McIntyre disclaims any responsibility for the fact that its shear machine "made its way to New Jersey." It only admits that it did "limited business" in the United States and sold a purportedly defective machine to an Ohio distributor. It insists that it had no knowledge that the distributor would later sell the machine to a New Jersey customer. Because it claims to have had no role or control over the sale of the machine to a New Jersey business owner, J. McIntyre contends the "single act of placing the machine into the stream of commerce outside of New Jersey is not enough [for this State's courts] to exercise personal jurisdiction over [it] in accordance with due process." J. McIntyre disavows marketing its products in, or having any contacts or relationships with, New Jersey and therefore maintains that it would "offend traditional notions of fair play and substantial justice" for it to be subject to the jurisdiction of our courts. (Citation and internal quotation marks omitted). Finally, J. McIntyre submits that the Appellate Division has rendered meaningless Justice O'Connor's requirement that, in addition to placing a product in the stream of commerce, a manufacturer engage in

conduct "'purposefully directed toward the forum State,'" such as direct marketing or designing a product for a customer in a particular state. (Quoting *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). Due process, it submits, does not empower a state, such as New Jersey, to exercise jurisdiction over a foreign manufacturer doing business generally in the United States.

In contrast, plaintiff Nicastro asks this Court to affirm the Appellate Division and find that J. McIntyre is subject to the jurisdiction of this State's courts because it targeted the United States as its geographical market and placed in the stream of commerce the defective industrial machine that permanently injured him. Plaintiff considers the jurisdictional issue at the heart of this case settled by this Court's decision in *Charles Gendler*. He asserts that J. McIntyre "sells its products throughout the United States, and yet claims immunity from suit anywhere, due to the strategy of using . . . [a] financially-irresponsible distributor with a nearly identical name." He prophesizes that "[t]o permit [J. McIntyre] to avoid personal jurisdiction in this products-liability matter will create a road-map for foreign manufacturers on how to dump their unsafe products in the United States" and escape liability in the state where their products cause personal injuries. Plaintiff urges that public policy should not allow such a "flanking maneuver" that will "leav[e] a catastrophically-injured citizen without legal recourse."

Appendix A

Amicus curiae, the Association of Trial Lawyers - New Jersey, urges this Court to reaffirm the stream-of-commerce doctrine adopted in *Charles Gendler* and espoused by Justice Brennan in *Asahi* as the basis for our courts to exercise jurisdiction over a foreign manufacturer whose defective product injures a New Jersey resident. The Association maintains that the use of the stream-of-commerce plus theory to "requir[e] additional conduct directed specifically to New Jersey . . . is a refusal to acknowledge the reality of globalization." It observes that "[n]o foreign manufacturer can expect to sell its product to the United States market, whether through a distributor or otherwise, without the product ultimately becoming located in one of the fifty states," and therefore J. McIntyre should not be surprised to be haled into a court of a state where its defective machine caused injury. Moreover, "[e]ven if there were personal jurisdiction over [J. McIntyre] in another State or the United Kingdom," the Association believes that requiring plaintiff to file a lawsuit in a place other than New Jersey, where he was injured and where everything relevant to his case is located, would defy this State's public policy to provide a forum for relief for workers victimized by defective products.

IV.

In determining whether our State courts have authority to exercise personal jurisdiction over J. McIntyre, we begin by dispensing with certain

jurisdictional doctrines that do not apply in this case.[7] We do not find that J. McIntyre had a presence or minimum contacts in this State in any jurisprudential sense that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction. Before turning to that claim, a brief history of the development of our law governing jurisdiction will help inform our analysis.

A.

The power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy. Our country has grown from an agrarian/manufacture-based economy dominated by local markets to a national economy fueled by the forces of industrialization. *See generally* Walter Licht, *Industrializing America: The Nineteenth Century* 133 (1995) (documenting evolution of American businesses from "producer[s] of small batches of goods sold in local and regional markets" to "marketers of mass-produced items nationally and even internationally"). Now, our nation

7. The facts in this case are basically undisputed. It is the legal consequences that flow from the facts that are at issue. Therefore, the standard of review is de novo. *See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

is part of a global economy driven by startling advances in the transportation of products and people and instantaneous dissemination of information. The expanding reach of a state court's jurisdiction, as permitted by due process, has reflected those historical developments.

In the nineteenth century, and earlier, a state court generally could not exercise personal jurisdiction over a non-resident defendant in accordance with due process unless the defendant was subject to process while physically present in the state. *See Pennoyer v. Neff*, 95 U.S. 714, 720-22, 24 L. Ed. 565, 568 (1878). That scheme emphasized the limits of a state's authority to subject a person outside its borders to the jurisdiction of its courts.

With the passage of time, technological progress in communications and transportation "increased the flow of commerce between States" and, correspondingly, "the need for [state courts to exercise] jurisdiction over nonresidents." *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958). That same technological progress has "made it much less burdensome for a party sued to defend [it]self in a State where [it] engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957). With the changing nature of the economy evolved a more flexible standard of jurisdiction "from the rigid rule of *Pennoyer v. Neff*." *Hanson, supra*, 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296. "In a continuing process of evolution [the United States Supreme Court] accepted and then

abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." *McGee*, *supra*, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225. The Court "expand[ed] the permissible scope of state jurisdiction over foreign corporations and other nonresidents" due in large part "to the fundamental transformation of our national economy." *Id.* at 222, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

In the mid-twentieth century, in *International Shoe Co. v. Washington*, the Court held that the State of Washington's courts could exercise personal jurisdiction over a Delaware corporation in proceedings instituted "to recover [the corporation's] unpaid contributions to the state unemployment compensation fund." 326 U.S. 310, 311, 321, 66 S. Ct. 154, 156, 161, 90 L. Ed. 95, 99, 105 (1945). The Delaware corporation had no offices or stock of merchandise in Washington but it directed eleven to thirteen salesmen who resided there and filled orders for products shipped into the state. *Id.* at 313-14, 66 S. Ct. at 157, 90 L. Ed. at 100. Because of the salesmen's "systematic and continuous" activities in Washington, the Court found that the jurisdictional requirements of due process had been met in rendering the out-of-state corporation accountable in Washington's courts. *Id.* at 320, 66 S. Ct. at 160, 90 L. Ed. at 104. In words now familiar, the Court noted that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the

> territory of the forum, he have *certain minimum contacts* with it such that *the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."*
>
> [*Id.* at 316, 66 S. Ct. at 158, 90 L. Ed. at 102 (second and third emphases added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)).]

In *McGee v. International Life Insurance Co.*, the Court held that a California state court properly exercised personal jurisdiction over a Texas life insurance company, which reneged on paying the beneficiary — a California resident — the proceeds of a policy on the death of the insured. 355 U.S. at 221-23, 78 S. Ct. at 200-201, 2 L. Ed. 2d at 224-26. Although the Texas company was not technically "present" in California, "[t]he [insurance] contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* at 222-23, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225-26. For due-process purposes, it was sufficient "that the suit was based on a contract which had [a] substantial connection with [California]." *Id.* at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

During the thirty-five years following *International Shoe*, a rapidly changing world economy required the United States Supreme Court to think anew about the limits of a state court's jurisdictional reach. In *World-*

Wide Volkswagen Corp. v. Woodson, the Court addressed for the first time whether an international manufacturer or distributor that places in the stream of commerce a purportedly defective product could be subject to the jurisdiction of a state where the product was purchased or accident occurred. 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501-02 (1980).

In that case, the Robinsons claimed that they were traveling through Oklahoma in their Audi when another vehicle struck their car in the rear, causing severe injuries due to a fire triggered by the "defective design and placement of the Audi's gas tank and fuel system." *Id.* at 288, 100 S. Ct. at 562, 62 L. Ed. 2d at 495. The Robinsons, who were residents of New York where the Audi was purchased, filed a product-liability action in Oklahoma. *Ibid.* The Court reaffirmed *International Shoe's* minimum-contacts test and pronounced that the Due Process Clause did not permit an Oklahoma court to exercise in personam jurisdiction over an Audi's retailer and wholesale distributor, both incorporated in New York, when their "only connection with Oklahoma [was] the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma."[8] *Id.* at 287-89, 299, 100 S. Ct. at 562-63, 568, 62 L. Ed. 2d at 495-96, 502.

8. In World-Wide Volkswagen, the manufacturer of the Audi automobile did not challenge jurisdiction in that product-liability case. 444 U.S. at 288 & n.3, 100 S. Ct. at 562-63 & n.3, 62

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However, the Court posited a new theory of state-court jurisdiction the stream of commerce to respond to the contemporary realities of modern commerce. The Court stated that

> [w]hen a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a [foreign automobile] manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective

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L. Ed. 2d at 495-96 & n.3. Therefore, the Court addressed, exclusively, Oklahoma's assertion of jurisdiction over the automobile's regional distributor and retail dealer, not its foreign manufacturer. *Ibid.; see also Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 571 n.4 (Minn. 2004) ("While the example used by the Court [to illustrate the stream-of-commerce theory] dealt with jurisdiction over manufacturers and national distributors, the only parties contesting jurisdiction in *World-Wide Volkswagen* were the retail dealer and regional distributor.").

> merchandise has there been the source of injury to its owner or to others. *The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.*
>
> [*Id.* at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d at 501-02 (emphasis added) (citation omitted).]

That formulation of the stream-of-commerce theory did not afford jurisdiction to an Oklahoma court against the automobile's retailer and distributor. *Id.* at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502.

Interestingly, in his dissent, Justice Brennan observed that "[t]he model of society on which the International Shoe Court based its opinion is no longer accurate" given the increased mobility of people and products due to the advances in transportation and communication. *Id.* at 308-09, 100 S. Ct. at 568, 62 L. Ed. 2d at 508-09 (Brennan, J., dissenting). He did not believe that if "a State [gave] a nonresident defendant adequate notice and opportunity to defend, . . . the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial." *Id.* at 310-11, 100 S. Ct. at 568, 62 L. Ed. 2d at 510. Nevertheless, Justice Brennan would require the plaintiff to bear the burden of "demonstrat[ing] sufficient contacts among the parties, the forum, and

the litigation to make the forum a reasonable State in which to hold the trial." *Id.* at 312, 100 S. Ct. at 568, 62 L. Ed. 2d at 511.

In the wake of *World-Wide Volkswagen*, and in recognition of the complex international marketing schemes that bring products into our State, in *Charles Gendler & Co. v. Telecom Equipment Corp.*, we "adopt[ed] the stream-of-commerce theory as a basis for asserting personal jurisdiction over a non-resident defendant." 102 N.J. 460, 477, 508 A.2d 1127 (1986). In *Charles Gendler*, the defendant Japanese manufacturer opposed New Jersey's assertion of jurisdiction in a suit involving its sale of an allegedly defective telephone system through its New York subsidiaries to an independent New Jersey corporation, which then sold the defective product to the plaintiff, Charles Gendler & Co., Inc., a company with a business office in New Jersey. *Id.* at 467, 508 A.2d 1127.

In adopting the stream-of-commerce theory, we took into account the contemporary reality of how companies in foreign countries market their products in the United States. *See Id.* at 477-79, 508 A.2d 1127. We observed that for a foreign manufacturer, "the sale of its product in a distant state is not simply an isolated event, but the result of the corporation's efforts to cultivate the largest possible market for its product." *Id.* at 477-78, 508 A.2d 1127. We acknowledged that "[i]n today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States," but instead "employ middlemen, many of whom

are often independent, to act as their distribution arms." *Id.* at 479, 508 A.2d 1127. With that understanding, we rejected the notion that foreign manufacturers should "be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." *Ibid.*

In *Charles Gendler*, in considering a state court's power to exercise in personam jurisdiction, we charted the contours of the stream-of-commerce theory. *See Id.* at 480-81, 508 A.2d 1127. First, "the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." *Id.* at 480, 508 A.2d 1127. Second, "a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state." *Id.* at 481, 508 A.2d 1127. Thus, "[t]he focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products." *Ibid.* Third, "[a] manufacturer's awareness of the distribution system, through which it receives economic and legal benefits, justifies subjecting the manufacturer to the jurisdiction of every forum within its distributors' market area." *Ibid.* "Accordingly, a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and

that it will be subject to the jurisdiction of every state." *Ibid.* Last, a manufacturer that wishes to avoid the jurisdiction of a particular state must at least "attempt[] to preclude the distribution and sale of its products in [that] state." *Ibid.*

In light of that new pronouncement on the stream-of-commerce theory, we remanded for additional discovery relating to jurisdiction, with a specific focus on "whether [the foreign defendant] was aware or should have been aware of a system for distributing its telephones throughout the United States." *Id.* at 483, 508 A.2d 1127.

A year after *Charles Gendler*, the United States Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), elaborated on the stream-of-commerce theory in two competing four-member opinions. In that case, the plaintiff in a product-liability action sued the Taiwanese manufacturer of an allegedly defective motorcycle tire tube that exploded on a California roadway, causing an accident that severely injured the plaintiff-driver and killed his wife. *Id.* at 105-06, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100. The Taiwanese manufacturer, in turn, sought indemnification from its codefendant, Asahi Metal Industry Co., Ltd., the Japanese manufacturer of the tube's valve assembly. *Id.* at 106, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100-01. After the plaintiff's claims were settled and dismissed, the Taiwanese manufacturer's indemnification action against Asahi in California remained. *Id.* at 106, 107

S. Ct. at 1029, 94 L. Ed. 2d at 100. On one point all nine members of the Court agreed: the California state court could not, consistent with due process, exercise personal jurisdiction over Asahi in the indemnification action. *Id.* at 113-16, 107 S. Ct. at 1033-34, 94 L. Ed. 2d at 105-07.

In finding that the California court lacked personal jurisdiction, Justice O'Connor, writing for four members of the Court, construed the facts under a test that has become known as stream-of-commerce plus. *Id.* at 108-13, 107 S. Ct. at 1030-32, 94 L. Ed. 2d at 102-05 (plurality opinion). Under that test, the actions of a defendant must be "*purposefully directed toward the forum State*" for a court of that state to exercise personal jurisdiction. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. In Justice O'Connor's view, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Ibid.* The stream-of-commerce plus test requires that the defendant engage in "[a]dditional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State." *Ibid.* That "additional conduct" could be "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Ibid.* Justice O'Connor emphasized that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing

the product into the stream into an act purposefully directed toward the forum State." *Ibid.*

Within that framework, Justice O'Connor found that the Japanese corporation Asahi did not "purposefully avail itself of the California market" simply by selling component parts to a Taiwanese manufacturer, even if Asahi was aware that the completed product would be sold in California. *Id.* at 112, 114, 107 S. Ct. at 1032-33, 94 L. Ed. 2d at 104-06. Justice O'Connor reasoned that because Asahi had no offices or agents in California, did not advertise or solicit business in the state, and "did not create, control, or employ the distribution system that brought its valves" there, a California court could not exercise personal jurisdiction. *Id.* at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. Justice O'Connor concluded that there was a lack of "minimum contacts" with California and therefore "the exercise of personal jurisdiction is [not] consistent with fair play and substantial justice." *Id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Joined by three other members of the Court, Justice Brennan did not believe that Justice O'Connor's opinion kept faith with the stream-of-commerce theory enunciated in *World-Wide Volkswagen*. *Id.* at 116-21, 107 S. Ct. at 1034-37, 94 L. Ed. 2d at 107-10 (Brennan, J., concurring in part and concurring in judgment). To trigger a court's power to exercise personal jurisdiction under the stream-of-commerce doctrine, Justice Brennan saw no need for a plaintiff to present "additional conduct" to establish that the defendant's

acts were "purposefully directed toward the form State." *Id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted). According to Justice Brennan, "[t]he stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107. Therefore, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Ibid.* Thus, the burden of litigation in the forum state is an economic expense related to the cost of doing business. *Id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107. Justice Brennan observed that the commercial benefits of selling a product in a state "accrue regardless of whether that participant directly conducts business in . . . or engages in additional conduct directed toward that State." *Id.* at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107. He noted that "most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct." *Id.* at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107-08.

Although Justice Brennan concluded that Asahi had the necessary minimum contacts with California, *Id.* at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110, he nevertheless agreed with Justice O'Connor that California's exercise of personal jurisdiction over Asahi would not comport with "fair play and substantial

justice,"[9] *Id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted).

B.

After *Asahi*, some federal and state courts have applied Justice O'Connor's stream-of-commerce plus theory.[10] Other courts have taken Justice Brennan's

9. Justice Stevens, writing for himself and two other members of the Court, "[saw] no reason in this case for [Justice O'Connor's] plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts." 480 U.S. at 122, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110 (Stevens, J., concurring in part and concurring in judgment). Accordingly, Justice O'Connor could not garner five votes for her stream-of-commerce plus test. Nevertheless, Justice Stevens also agreed that California did not have a basis to assert jurisdiction because the "minimum requirements inherent in the concept of fair play and substantial justice . . . defeat[ed] the reasonableness of jurisdiction." *Id.* at 121-22, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110 (citation and internal quotation marks omitted).

10. *See, e.g., Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479-80 (6th Cir.) (expressing "preference" for Justice O'Connor's approach and applying it to case), *cert. denied*, 540 U.S. 948, 124 S. Ct. 399, 157 L. Ed. 2d 279 (2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-46 (4th Cir. 1994) (taking approach similar to that of Justice O'Connor) *cert. denied*, 513 U.S. 1151, 115 S. Ct. 1103, 130 L. Ed. 2d 1070 (1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992) (same); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir 1990) (same); *Sorrells v. R & R Custom Coach Works*, 636 So. 2d

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approach or have read *World-Wide Volkswagen* more expansively than Justice O'Connor's parsing of that opinion in Asahi.[11] Yet, others simply have declined to

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668, 674 (Miss. 1994) (applying Justice O'Connor's theory); Vt. *Wholesale Bldg. Prods. v. J.W. Jones Lumber Co.*, 154 N.H. 625, 914 A.2d 818, 826 (N.H. 2006) (declining "to adopt Justice Brennan's view," and "find[ing] Justice O'Connor's 'stream of commerce plus' theory more consistent with *World-Wide Volkswagen*").

11. *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir.) (taking broad approach to stream-of-commerce theory), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.) ("Because the Court's splintered view of minimum contacts in Asahi provides no clear guidance on this issue, we continue to gauge [the defendant's] contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit."), *cert. denied*, 493 U.S. 823, 110 S. Ct. 83, 107 L. Ed. 2d 49 (1989); *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218, 223 (S.C. 2008) (finding personal jurisdiction under broad stream-of-commerce theory where defendant's "actions indicate that it purposely availed itself of conducting business in all 50 states, including South Carolina"); *Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609, 616 (W. Va. 1992) (noting that under stream-of-commerce theory, personal jurisdiction "can be exercised without the need to show additional conduct by the defendant aimed at the forum state"), *cert. denied*, 508 U.S. 908, 113 S. Ct. 2338, 124 L. Ed. 2d 249 (1993); *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, 245 Wis. 2d 396, 629 N.W.2d 662, 674 (Wis. 2001) ("We believe the stream of commerce theory as set forth by Justice Brennan is the correct analysis to apply to the case at hand."), *cert. denied*, 534 U.S. 1079, 122 S. Ct. 808, 151 L. Ed. 2d 694 (2002).

choose between the views of the two Justices instead applying both, with some directing their analyses to Justice O'Connor's more restrictive approach without explicitly rejecting Justice Brennan's approach.[12]

12. *See, e.g., Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999) (declining to "adopt either view of the 'stream of commerce' standard" because jurisdiction existed even under Justice O'Connor's "more restrictive view"); *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 205-07 (3d Cir. 1998) (taking approaches articulated by both Justices O'Connor and Brennan); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir.) (same), *cert. dismissed*, 512 U.S. 1273, 115 S. Ct. 18, 129 L. Ed. 2d 917 (1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1547-48 (11th Cir.) (refusing to determine which approach controls because jurisdiction could be exercised even under Justice O'Connor's "more stringent 'stream of commerce plus' analysis"), *cert. denied*, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1359 (Ariz.) (refraining from "enter[ing] the debate between" *Asahi's* theories because "we decide this case under *Asahi's* more restrictive interpretation of due process"), *cert. denied*, 516 U.S. 906, 116 S. Ct. 273, 133 L. Ed. 2d 194 (1995); *Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 530 N.E.2d 1382, 1389, 125 Ill. Dec. 812 (Ill. 1988) ("We need not decide [between *Asahi's* theories] . . . for we believe that even under the broader version of the stream of commerce theory there were no minimum contacts . . . ."); *State v. Grand River Enters., Inc.*, 2008 SD 98, 757 N.W.2d 305, 314 (S.D. 2008) ("We do not reach the State's 'plus' argument because we conclude that the State failed to meet its burden of proof even under the more inclusive expectation standard in *World-Wide Volkswagen/Asahi*.").

Appendix A

In some cases, courts have dodged the stream-of-commerce conflict entirely by deciding a jurisdictional issue on firmer and more traditional grounds. For example, in *Lebel v. Everglades Marina, Inc.*, a contract dispute case involving a claim of fraud, we saw no need to decide whether the defendant Florida company, which sold a luxury racing boat to a New Jersey resident, was subject to the jurisdiction of a New Jersey court based on the stream-of-commerce theory. 115 N.J. 317, 319-20, 558 A.2d 1252 (1989) ("Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate."). Instead, we turned to the traditional *International Shoe* standard, finding that the defendant's actions met the minimum-contacts requirement and that the exercise of jurisdiction by New Jersey would not offend "'traditional notions of fair play and substantial justice.'" *Id.* at 321-29, 558 A.2d 1252 (quoting *Int'l Shoe Co.*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102).

Here, unlike in *Lebel*, we cannot evade consideration of the stream-of-commerce theory for it is the only basis on which the English manufacturer could be subject to the jurisdiction of a New Jersey court.

Appendix A

V.

New Jersey has a long-arm rule that permits service of process on a non-resident defendant "consistent with due process of law." R. 4:4-4(b)(1). Therefore, our State courts may exercise jurisdiction over a non-resident defendant "to the uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971). There is no question that the United States Supreme Court in *Asahi* embraced the stream-of-commerce theory in one form or another. In the twenty-two years since *Asahi*, transnational commerce has accelerated, and we realize more than ever that we live in a global marketplace. In light of *Asahi*, and given what we know of the modern economic world, we must decide whether the stream-of-commerce test that we set forth in *Charles Gendler* comports with the Due Process Clause of the Fourteenth Amendment.

A.

Today, we reaffirm the reasoning of our decision in *Charles Gendler*, and hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action. All in all, *Charles Gendler*, in pronouncing when a State court can exercise personal jurisdiction over a defendant based on the stream-of-commerce doctrine, gave a faithful and fair

reading of World-Wide Volkswagen, one that is more reflective of Justice Brennan's views expressed in *Asahi*.

Notably, where a foreign manufacturer has sold its products through a nationwide distribution scheme, some courts including the Appellate Division in this case have construed Justice O'Connor's stream-of-commerce plus theory in *Asahi* in a way that is indistinguishable from *Charles Gendler* and the general language of *World-Wide Volkswagen*. *See, e.g., Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 543-45 (6th Cir.), *cert. denied*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1360-64 (Ariz.), *cert. denied*, 516 U.S. 906, 116 S. Ct. 273, 133 L. Ed. 2d 194 (1995); *Nicastro*, *supra*, 399 N.J. Super. at 557-560, 564-65.

Those courts did not believe that Justice O'Connor intended that a foreign manufacturer seeking to capture a national market through a nationwide distribution scheme would be immune from suit in every state. In the views of those courts, the additional conduct required by Justice O'Connor under her stream-of-commerce approach would be the targeting of the national market through, among other things, general sales solicitations orchestrated by a manufacturer's independent distributor. *See, e.g., Tobin*, *supra*, 993 F.2d at 543-45; *A. Uberti & C.*, *supra*, 892 P.2d at 1360-65; *Nicastro*, *supra*, 399 N.J. Super. at 557-560, 564-65. Thus, even under Justice O'Connor's approach, arguably, a manufacturer would be amenable to

jurisdiction in every state that is part of its national distribution scheme. *See, e.g., Tobin, supra*, 993 F.2d at 543-45 (permitting Kentucky to exercise personal jurisdiction over Netherlands drug manufacturer, which sought Federal Drug Administration approval for drug and, through American distributor, "made a deliberate decision to market [the drug] in all 50 states, including Kentucky"); *A. Uberti & C., supra*, 892 F.2d at 1360-65 (permitting Arizona to exercise personal jurisdiction over Italian firearms manufacturer, which sold revolvers intended for sale in United States through American distributor); *Nicastro, supra*, 399 N.J. Super. at 564, 945 A.2d 92 ("[D]efendant's conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey.").

Charles Gendler, although decided twenty-three years ago, speaks to the present realities of international trade and complex marketing techniques of transnational corporations that bring products, some dangerous and defective, into our State. In *Charles Gendler*, we recognized approaches concerning jurisdiction in stream-of-commerce cases that had long been in use in New Jersey courts. *See Charles Gendler, supra*, 102 N.J. at 476-77, 508 A.2d 1127 (citing *Coons v. Honda Motor Co., Ltd. of Japan*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980), *vacated and remanded*, 455 U.S. 996, 102 S. Ct. 1625, 71 L. Ed. 2d 857 (1982), *rev'd on other grounds*, 94 N.J. 307, 463 A.2d 921 (1983), *reh'g granted*, 95 N.J. 234, 470 A.2d 446, *modified*, 96

N.J. 419, 476 A.2d 763 (1984), *cert. denied*, 469 U.S. 1123, 105 S. Ct. 808, 83 L. Ed. 2d 800 (1985); *Certisimo v. Heidelberg Co.*, 122 N.J. Super. 1, 298 A.2d 298 (Law Div. 1972), *aff'd sub nom. Van Eeuwen v. Heidelberg E., Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (App. Div. 1973)).

The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.

A number of significant policy reasons animate the approach articulated in *Charles Gendler* the approach we follow today. A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees. A state also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528, 541 (1985) ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citation and internal quotation marks omitted)); *see also Charles Gendler*, *supra*, 102 N.J. at 483, 508

A.2d 1127 ("A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.").

It would be strange indeed if a New Jersey manufacturer that makes a defective and dangerous product and is both subject to the jurisdiction of our courts and accountable under our product-liability laws would be able to move its plant to a foreign land and peddle its wares through an independent distributor across the nation, with some purchased by New Jersey consumers, and suddenly become beyond the reach of one of our injured citizens through this State's legal system. Our conception of jurisdiction must surely comport with traditional notions of fair play and substantial justice, but must also reflect modern truths the radical transformation of the international economy. Just as changing times led the United States Supreme Court to jettison "'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations," *McGee*, *supra*, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225, so too must we discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.

In today's world, foreign manufacturers, plying overseas markets, should be covered by insurance,

accounting for the risks of doing business and providing a fund for consumers who may be injured by their products. *See World-Wide Volkswagen*, *supra*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501. Defending a suit in one of the United States, moreover, is not as burdensome as it once might have been, given that air transport can bring the principals of a business here within hours and instantaneous communication allows an ongoing dialogue with counsel in this country. *See McGee*, *supra*, 355 U.S. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226. If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury. Although we cannot control manufacturing plants leaving this country or control a foreign manufacturer's employment policy, working conditions, or the quality of its operations, we can ensure that a manufacturer that targets its defective products at a wide geographic market that includes New Jersey will not be immune from suit in our State's courts. A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State. *See Charles Gendler*, *supra*, 102 N.J. at 481, 508 A.2d 1127.

Appendix A

B.

Before addressing the facts in this case, we restate the governing stream-of-commerce principles in *Charles Gendler* that will apply in a product-liability case.[13] A foreign manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. *Id.* at 480, 508 A.2d 1127. A manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states must expect that it will be subject to this State's jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury. *Id.* at 480-81, 508 A.2d 1127. The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. *Ibid.* A manufacturer cannot shield itself merely by employing an independent distributor a middleman knowing the predictable route the product

13. In this case, we address the stream-of-commerce doctrine in a product-liability action in which an allegedly defective machine severely injured a New Jersey resident. We do not discount that there may be cases in which a plaintiff's injury may be so minor that an assertion of jurisdiction by a New Jersey court would not comport with traditional notions of fair play and substantial justice. *See Charles Gendler, supra,* 102 N.J. at 482, 508 A.2d 1127 ("We recognize that the nature of the injury is relevant to the jurisdictional inquiry.").

will take to market. *Id.* at 479-80, 508 A.2d 1127. If a manufacturer does not want to subject itself to the jurisdiction of a New Jersey court while targeting the United States market, then it must take some reasonable step to prevent the distribution of its products in this State. *Id.* at 481, 508 A.2d 1126.[14]

C.

In light of those principles, we find that the record supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine. J. McIntyre, a company incorporated in the United Kingdom,

14. Given this detailed standard, taken from *Charles Gendler*, we are at a loss at how the dissent can claim that the majority has created "a new test that consists of but one inquiry: whether a product has found its way here." *Infra* at (slip op. dissent at 4). That mischaracterization is repeated in varying forms throughout the dissent. *See, e.g., infra* at (slip op. dissent at 17, 21-23, 27-29). It is the dissent's narrow parsing of *Charles Gendler*, not our copious quotations from and analysis of that opinion, which "has contorted the stream of commerce theory." *Infra* at (slip op. dissent at 22-23). The dissent turns a blind eye to the language in *Charles Gendler* that does not fit into its constricted view of jurisdiction. For example, the dissent tellingly omits that, under *Charles Gendler, supra*, a manufacturer with a "nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state." 102 N.J. at 481, 508 A.2d 1127. Ultimately, the dissent does not accept the basic teachings of *Charles Gendler* and would convert the "stream of commerce" doctrine into a dry bed.

targeted the United States market for the sale of its recycling products. It did so by engaging McIntyre America, an Ohio-based company, as its exclusive United States distributor for an approximately seven-year period ending in 2001. J. McIntyre knew or reasonably should have known that the distribution system extended to the entire United States, because its company officials, along with McIntyre America officials, attended scrap metal trade shows and conventions in various American cities where its products were advertised. Indeed, J. McIntyre's president was present at the Las Vegas trade convention where his exclusive distributor introduced plaintiff's employer to the allegedly defective McIntyre Model 640 Shear that severed four of plaintiff's fingers.

It is clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events, and that the joint appearances by J. McIntyre and McIntyre America were calculated efforts to penetrate the overall American market. Plaintiff's employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre's machines. J. McIntyre may not have had access to McIntyre America's customer list, but J. McIntyre knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should

have known that the products were intended for sale and distribution to customers located anywhere in the United States.

J. McIntyre and McIntyre America shared a common name that may have suggested to unwitting members of the public some form of corporate relationship, despite the fact that both companies were independent business entities with different owners and management. The information sheet that accompanied the 640 Model Shear included J. McIntyre's address and telephone number and, according to the New Jersey businessman who purchased that machine, "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts." There can be little doubt that J. McIntyre and McIntyre America worked together to promote and sell J. McIntyre products in the United States as evidenced by their shared communications and joint participation at industry trade conventions. It bears mentioning that J. McIntyre maintained ownership of at least some of its products delivered to McIntyre America until the distributor sold the products to a United States customer. Under that product-consignment relationship, McIntyre America would earn a commission from its sale of J. McIntyre's products after J. McIntyre collected its payment.

Because J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers, it now must

present a compelling case that defending a product-liability action in New Jersey would offend "'traditional notions of fair play and substantial justice.'" *Lebel, supra*, 115 N.J. at 328, 558 A.2d 1252 (citing *Burger King Corp., supra*, 471 U.S. at 477, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544). However, J. McIntyre cannot make out a case that travel to New Jersey is onerous or an unfair burden for it to bear. J. McIntyre's officials have visited various cities throughout the United States to promote its business interests, attending trade conventions and meeting with representatives of its exclusive distributor. Certainly, defending the product-liability action in Ohio, where J. McIntyre's now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada courts would seem to have an interest in resolving a product-liability action in which an English manufacturer's product injured a New Jersey resident in New Jersey.

On the other hand, New Jersey has a strong interest in exercising jurisdiction. Plaintiff is a New Jersey resident; the allegedly defective product was purchased by a New Jersey consumer, plaintiff's employer; the injury occurred in a New Jersey workplace; plaintiff was treated for his injuries in the New Jersey regional area; the evidence the shear machine and most of the necessary witnesses are located in New Jersey; and last, the law of this State likely will govern the action. It would be unreasonable to expect that plaintiff's only form of

relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law. Under all the circumstances, New Jersey has a rightful claim to resolve the dispute between the parties and to assert jurisdiction over this product-liability action. We will not deny plaintiff a forum in the courts of this State.

VI.

The stream-of-commerce doctrine of jurisdiction is particularly suitable in product-liability actions. It will not necessarily be a substitute for other jurisdictional doctrines, i.e., minimum contacts, that will apply in contract and other types of cases. *See McKesson Corp. v. Hackensack Med. Imaging*, 197 N.J. 262, 266-67, 277-78, 962 A.2d 1076 (2009) (applying minimum-contacts test in holding that Texas court properly exercised personal jurisdiction over defendant New Jersey corporation that entered into commercial transactions with plaintiff-corporation in Texas). Within the confines of due process, jurisdictional doctrines must reflect the economic and social realities of the day. The exercise of jurisdiction by New Jersey in this case is a reasoned response to the globalization of commerce that permits foreign manufacturers to market their products through distribution systems that bring those products into this State. With the privilege of distributing products to consumers in our State comes the responsibility of answering in a New Jersey court if one of those consumers is injured by a defective product.

Appendix A

For the reasons expressed, we affirm the judgment of the Appellate Division, which reinstated plaintiff's product-liability action, and remand this matter to the trial court for proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES LONG , LaVECCHIA , and WALLACE join in JUSTICE ALBIN's opinion. JUSTICE HOENS filed a separate, dissenting opinion, in which JUSTICE RIVERA-SOTO joins. JUSTICE RIVERA-SOTO filed a separate, dissenting opinion.

APPENDIX B DISSENTING OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY

A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v.

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

JUSTICE HOENS, dissenting.

I respectfully dissent. Quoting extensively from this Court's decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986), the majority asserts, indeed insists, that it is merely reaffirming and applying the bedrock jurisdictional

principles this Court has long embraced. *Ante* at (slip op. at 33, 38-40). The majority purports as well to harmonize the *Gendler* holding with the analyses set forth in the competing plurality opinions of the United States Supreme Court, *see Asahi Metal Indus. Co., Ltd.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). In fact, the majority's opinion does nothing of the sort.

Instead, in place of utilizing any of the analytical frameworks found in those three precedents, the majority has created an entirely new and unbounded test for asserting jurisdiction over foreign entities. Indeed, it is only by ignoring the essential underpinnings shared by those three opinions that the majority can reach its result; it is only by the use of subtle and unspoken shifts in language and emphasis that the majority is able to transform *Gendler* from what it is to what the majority chooses to have it mean. And transform it is precisely what the majority does. Because where *Gendler* used the stream of commerce theory as but one part of a larger due process analysis, with its traditional focus on the foreign defendant's connection to this forum, the majority has effectively substituted any effort by a manufacturer to sell its product anywhere in the nation as the only act needed for assertion of our jurisdiction.

Repeated quotations and soaring language about the realities of the global marketplace might compel the casual reader to follow what appears to be the majority's relentless logic. But those rhetorical techniques cannot mask the fact that the majority today embarks on a path

that stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point. In doing so, the majority has, notwithstanding its protestations to the contrary, elected to forge a new and uncharted path. Because it is a path with which I cannot agree, I dissent.

I.

The issue presented to the Court in this dispute is a familiar one, for it requires us to decide whether our courts have jurisdiction over a foreign manufacturer of a product that is alleged to have injured one of our residents. At the same time, what might otherwise be an almost mundane exercise is complicated by the challenge of balancing the rights of the parties when the realities of a twenty-first century global economy strain against the outer limits of due process. In an effort to strike the right balance, we are asked to apply the stream of commerce theory, as articulated by this Court, *see Gendler*, *supra*, 102 N.J. at 480-81, 508 A.2d 1127; *cf. Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989) (declining to employ stream of commerce in place of traditional jurisdictional analysis), and as explained in the competing plurality opinions handed down by the United States Supreme Court, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion); *id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107-08 (Brennan, J., concurring). That theory, therefore, is at the heart of the debate in this appeal.

Appendix B

In the majority's view, applying that theory demands that this foreign manufacturer be subject to the jurisdiction of our courts. Objectively analyzed, however, it is hardly that simple, because in its articulation of the stream of commerce theory, the majority has strayed far from the precedents it purports to apply. Starkly stated, the majority has abandoned the cautious wisdom of *Gendler* and *Asahi*, creating in their place a new test that consists of but one inquiry: whether a product has found its way here. In the majority's version of the stream of commerce theory, that fact alone suffices to subject the manufacturer of that product to our jurisdiction. But the majority's opinion fails to articulate an analysis consistent with any of the well-established tests that have discussed the stream of commerce theory and, in the process, departs radically from all of them. More to the point, the majority reaches its result only by disregarding carefully developed notions of due process to which non-resident defendants always have been entitled. I therefore respectfully dissent.

Three opinions, one in *Gendler* and the two plurality opinions in *Asahi*, stand at the core of the debate over jurisdiction in this appeal. Although each uses "stream of commerce" as its central theme, those decisions agree on neither the meaning nor the implications of that concept as it relates to the exercise of jurisdiction. Instead, each of those opinions considers the manufacturer's use of modern commercial distribution schemes, referred to as the stream of commerce, as but one part of a traditional jurisdictional inquiry. In doing

so, those opinions express diverse views that spring from different theoretical underpinnings, but none of them uses the stream of commerce concept as an independent source of jurisdiction; each considers it solely for the role it plays in the context of a due process analysis.

In reality, it is only by appreciating what each of those decisions actually understood the "stream of commerce" theory to mean that one can hope to apply any of those distinct theories about jurisdiction to this dispute. One cannot, as does the majority in this appeal, simply pluck out the words "stream of commerce" from those opinions and, repeating them like some ancient incantation, imply that it is a free-standing theory that supports the result the majority reaches. Nor can one use the phrase as if it were a short-hand substitute for a single analytical approach, so as to suggest that one has adhered to settled principles expressed in those three opinions. On the contrary, a careful explanation of the different versions of the stream of commerce theory set forth in those three opinions will best illustrate how the majority's approach has departed from, rather than adhered to, any of those precedents.

A.

This Court's prescient and groundbreaking opinion in *Gendler* is perhaps the best starting place, because it engaged in a thorough and scholarly analysis of the underlying problem of jurisdiction over foreign manufacturers that not only preceded the United States Supreme Court's effort to tackle the question, but that continues to serve us well today.

Appendix B

As the *Gendler* Court recognized, all questions concerning a state's assertion of personal jurisdiction "must comport with the due-process requirement of the fourteenth amendment." *Gendler, supra*, 102 N.J. at 469, 508 A.2d 1127. Although we have long interpreted our long-arm jurisdiction to be consistent with "the uttermost limits permitted by the United States Constitution," *ibid.* (quoting *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971)), the fundamental and unquestioned right of a foreign defendant to due process remains the essential touchstone of jurisdiction.

In *Gendler*, the Court traced the origins of the stream of commerce theory through a review of the historical development of our theories of long-arm jurisdiction generally, beginning with the requirement of physical presence, *ibid.* (citing *Pennoyer v. Neff*, 5 Otto 714, 95 U.S. 714, 24 L. Ed. 565 (1878)), through the minimum contacts approach begun thereafter, *see ibid.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)), to explain the framework within which a stream of commerce theory might apply. As part of that analysis, the Court pointed out that deciding whether it is fair to subject any defendant to suit in a particular forum has evolved to include concepts such as whether defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *id.* at 471, 508 A,2d 1127 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958)), and whether "defendant's contacts with the

forum state [are] such that it 'should reasonably anticipate being haled into court there.'" *Id.* at 470, 508 A.2d 1127 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980)).

The Court in *Gendler* pointed out that the United States Supreme Court, in *World-Wide Volkswagen*, had recognized the vitality of a stream of commerce theory, but described that theory as having two component parts. Quoting the United States Supreme Court, this Court described the theory as permitting the exercise of jurisdiction over a non-resident manufacturer if that manufacturer first, places its products into the stream of commerce and, second, does so "with the expectation that they will be purchased by consumers in the forum State." *Id.* at 474, 508 A.2d 1127 (quoting *World-Wide Volkswagen*, *supra*, 444 U.S. at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502). That second consideration, that is, the manufacturer's expectation, was related to the Court's reliance on a foreseeability analysis, and remains entirely consistent with the traditional inquiry about whether defendant could reasonably anticipate being "haled into court." *Id.* at 475, 508 A.2d 1127. Although this Court referred to the stream of commerce theory that had developed in the federal courts as "an independent basis to satisfy the minimum-contacts standard," *id.* at 476, 508 A.2d 1127 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528, 541 (1985)), its quotations from the United States Supreme Court's opinion in *Burger King* make plain that this Court recognized that stream

of commerce necessarily includes the element of expectation of purchase in this state. That is, by recognizing that there are two elements to the theory, this Court did not substitute mere usage of the stream of commerce as if it were a free-standing basis for jurisdiction, but instead included within it the fairness and foreseeability analyses that are essential to due process. *Ibid.*

Turning to an exhaustive analysis of both state and federal precedents in which the stream of commerce theory had been considered, this Court considered the exercise of jurisdiction over foreign manufacturers generally, finding that concepts such as the nature of the chosen chain of distribution, *see id.* at 477-78, 508 A.2d 1127, and evidence of a manufacturer's "purposeful penetration of the [forum state's] market," *id.* at 478, 508 A.2d 1127, were relevant to any consideration of the stream of commerce theory. In the end, however, the Court returned to fundamental concepts of due process, holding fast to considerations of purposeful availment, *ibid.*, reasonable expectations of being haled into court, *id.* at 475, 508 A.2d 1127, and receipt of benefits of the forum, *id.* at 480, 508 A.2d 1127, as the guiding principles of our jurisdictional analysis. This Court described with precision the test to be applied: "The crucial question is whether [the foreign manufacturer] was aware or should have been aware of a system of distribution that is *purposefully directed at New Jersey residents.*" *Gendler, supra*, 102 N.J. at 484, 508 A.2d 1127 (emphasis added).

Appendix B

It is instructive to emphasize what *Gendler* did *not* decide. This Court did not conclude that the simple process of a product being placed into the general stream of commerce and ending up here was enough to support jurisdiction. Nor did this Court decide that creating a system of distribution that resulted in a product finding its way here was enough. Instead, this Court linked together two elements, awareness and purposefulness, that are critical, from the point of view of due process, to an exercise of jurisdiction. All of the comments in *Gendler* about the realities of a global economy and of nationwide patterns of distribution aside, this Court remained true to concepts long recognized to be the fundamental basis on which any state can exercise jurisdiction over a foreign entity.

B.

An analysis of the two competing plurality opinions of the United States Supreme Court in *Asahi*, *supra*, leads to a similar conclusion, that is, that in evaluating any state's exercise of long-arm jurisdiction, the Court's core concern is due process. On that point, both the plurality opinion authored by Justice O'Connor and the concurring opinion written by Justice Brennan agree. The basis for deciding all jurisdictional questions remains rooted in our traditional notions of due process, *see Asahi*, *supra*, 480 U.S. at 108-09, 107 S. Ct. at 1030, 94 L. Ed. 2d at 102 (O'Connor, J., plurality opinion); *id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107-08 (Brennan, J., concurring), and must comport with "fair play and substantial justice," *see id.* at 113, 107 S. Ct. at

1033, 94 L. Ed. 2d at 105 (O'Connor, J., plurality opinion) (quoting *Int'l Shoe*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102); *id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring) (quoting *Int'l Shoe*, *supra*, 326 U.S. at 320, 66 S. Ct. at 160, 90 L. Ed. at 104).

Each of the plurality opinions uses the same test, namely, whether the foreign manufacturer has done something to "purposefully avail itself of the market in the forum State." *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103 (O'Connor, J., plurality opinion); *id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring). Each, significantly, makes clear that it is inappropriate to define the stream of commerce theory in such a way that the label takes the place of an evaluation of purposeful availment.

That is, Justice O'Connor, as part of considering the stream of commerce theory, framed the question in terms of whether it is consistent with the protections afforded by the Due Process Clause to assert jurisdiction over a defendant whose product was "swept" by the stream of commerce "into the forum State, but [where] the defendant did nothing else to purposefully avail itself of the market in the forum State." *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103. In her view, merely placing a product into the stream of commerce is insufficient to support jurisdiction because, without more, it cannot constitute action purposefully directed at the forum state. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. Although

reaching a different conclusion on what purposeful availment requires, Justice Brennan's opinion does not disagree with the notion that merely placing a product into the stream of commerce will not suffice. He explicitly pointed out that, in his understanding, "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Both of the plurality opinions in *Asahi*, therefore, caution against using "stream of commerce" as a surrogate for the analysis of the connection between the foreign entity and the forum that due process demands. The two opinions differ only in their definition of what, in addition to placing a product into the stream of commerce, will be required in order for the assertion of jurisdiction to pass constitutional muster.

For Justice O'Connor, the key lies in identifying sufficient additional conduct that would qualify to meet the test of purposeful availment. In her view, such conduct could be anything that would indicate that the foreign entity intended to serve a forum state's market, including: designing the product for the forum state's market; advertising there; establishing channels for providing regular advice to customers in the particular forum state; or marketing the product through a distributor that has agreed to serve as the sales agent in the forum state. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104.

Applying those concepts to the factual record before the Court in *Asahi*, Justice O'Connor concluded that the plaintiff's proofs fell short. She noted, for example, that the defendant did no business in the forum state, had no office, no agents, no employees and no property there. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. She observed that the defendant did not create, control or directly utilize the distribution system that brought its product to the forum state, because its product was merely a component of a vehicle being sold and distributed by others. *Ibid.* Moreover, she found in the record no evidence that the defendant had designed its product in anticipation of sales in the forum state. *Id.* at 113, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. Because the record lacked any evidence of conduct by the defendant that would tend to demonstrate that it had engaged in purposeful availment of the benefits of the forum, the opinion concluded that due process considerations would be offended by requiring it to appear and defend there.

More to the point, Justice O'Connor's plurality opinion in *Asahi* closely linked the assertion of jurisdiction over a defendant that has introduced a product into the stream of commerce to traditional notions of personal jurisdiction and the Due Process Clause, because jurisdiction rested on conduct of some variety or an intentional act directed at the forum. Far from simply relying on the act of introducing one's product into the stream of commerce, her opinion is rooted in the well-settled principle that jurisdiction must be based on some action or conduct that demonstrates

that the defendant has purposefully availed itself of the forum state's market.

Justice Brennan's concurring opinion in *Asahi* expressed a different view, but one that is equally grounded on ordinary concepts of due process and the extent to which that constitutional guarantee would be offended by the absence of a direct physical connection between the manufacturer's activities and the result of its product ending up in the forum state. He, too, considered the nature and extent of a manufacturer's activities that would suffice to satisfy the basic requirement that jurisdiction be supported by a defendant's purposeful availment of the forum state's market. *Id.* at 116-17, 107 S. Ct. 1034-35, 94 L. Ed. 2d at 107-08. He disagreed with Justice O'Connor's conclusion that affirmative conduct was needed, reasoning that due process notions of purposeful availment could be satisfied instead by evidence demonstrating that the manufacturer was aware of the fact that its product was being marketed in the forum state. *Id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107. Simple awareness of a remote possibility, however, is insufficient for jurisdiction as Justice Brennan understood it. Rather, in his words,

> [t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the

> forum State, the possibility of a lawsuit there cannot come as a surprise.
>
> [*Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.]

Although Justice Brennan found it unnecessary for a plaintiff to show "additional conduct" directed toward the forum by a manufacturer, he defined the stream of commerce to include an affirmative awareness that the product, either separately or as a component part, is being marketed in the forum state. *Ibid.*

Justice Brennan commented that, as long as the manufacturer "is aware that the final product is being marketed in the forum," *ibid.*, there is a connection between the manufacturer and the forum sufficient for due process purposes. His opinion, therefore, did not substitute mere placement of a product into the stream of commerce for the ordinary requirements needed to satisfy due process. Nor did he embrace some metaphysical or theoretical definition of awareness. Instead, his opinion emphasized that there are two key indicia of "awareness" needed to support jurisdiction consistent with due process, namely, the regularity of the sales in or to the forum state and evidence of defendant's expectation that its product would be purchased there. *Id.* at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110.

Appendix B

As part of his examination of the factual record in *Asahi*, Justice Brennan concluded that the evidence of regular and extensive sales of a product by the defendant to a manufacturer for incorporation as a component part, coupled with the defendant's knowledge that the manufacturer was engaged in the regular course of selling the final product in the forum state, was the crucial basis for the exercise of jurisdiction. He pointed out that the defendant's components were included in at least eighteen percent of the products sold in one forum state store and that the defendant, on average, annually sold hundreds of thousands of its components to the manufacturer. *See id.* at 121 n.4, 107 S. Ct. at 1037 n.4, 94 L. Ed. 2d at 110 n.4. Justice Brennan, therefore, found ample support for the "awareness" analysis embodied in his stream of commerce theory, leading to the conclusion that the defendant's due process rights would not be abridged by subjecting it to jurisdiction. *Id.* at 121, 107 S. Ct. at 1036 37, 94 L. Ed. 2d at 110.

II.

Neither of the *Asahi* opinions abandoned due process as the essential underpinning of jurisdiction, or reliance on purposeful availment as the core of that analysis. Neither of the *Asahi* opinions, moreover, equated merely placing a product into the stream of commerce somewhere in the United States with purposeful availment sufficient to comport with due process and to support jurisdiction. On the contrary, as those opinions and this Court's decision in *Gendler* make

clear, this Court and the United States Supreme Court have never strayed from the recognition that due process is fundamental to the constitutional assertion of jurisdiction over a non-resident defendant. This Court and the United States Supreme Court have never varied from holding that due process demands that there be some connection between a defendant and the forum, whether that analysis is expressed in terms of minimum contacts, *see Int'l Shoe*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102, or purposeful availment, *see Burger King*, *supra*, 471 U.S. at 475-76, 105 S. Ct. at 2183-84, 85 L. Ed. 2d at 542-43, or an action purposefully directed toward the forum State, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion), or awareness of regular and extensive sales of its product by another, *see Asahi*, *supra*, 480 U.S. at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110 (Brennan, J., concurring), or purposefulness demonstrated by the knowledge that one's products will be sold in the forum state, *see Gendler*, *supra*, 102 N.J. at 480, 508 A.2d 1127.

Today, in the guise of reaffirming *Gendler*, *ante* at (slip op. at 33), the majority cuts all ties with precedent and does what *Asahi* warned against, equating the mere placement of a product into the stream of commerce somewhere with whatever due process would otherwise demand for assertion of jurisdiction anywhere. The majority does so by first conceding that nothing in this record would satisfy the traditional minimum contacts test, *ante* at (slip op. at 15). It then describes the stream of commerce as if it were an alternative rationale,

ibid., proceeding thereafter to review the factual record in terms meant to match the ones used by this Court in *Gendler*.

As characterized by the majority, this case is about a foreign company that engaged in "purposeful marketing" of its product, *ante* at (slip op. at 2), that used a "distribution scheme," *ibid.*, and that "targeted" a geographical market that included New Jersey, *ante* at (slip op. at 2, 3, 33). There can be little debate, of course, that if defendant in fact had a "distribution scheme" like the ones considered in *Gendler* and *Asahi*, and if it "targeted" this state in particular, our traditional notions of due process would support the exercise of jurisdiction. This record, however, has evidence neither of a "distribution scheme" nor of "targeting" consistent with what this Court in *Gendler* or the United States Supreme Court in *Asahi* discussed. Indeed, it is only through subtle and unspoken, but analytically significant, shifts in the meaning of those phrases that the majority is able to assert that it is applying those precedents faithfully. It is, however, the very real distinctions between what the earlier opinions meant and what the majority today means that demonstrate that there is no faithful adherence to those precedents at all.

First, the "distribution scheme" in *Gendler* included a foreign manufacturer's creation of a wholly-owned subsidiary that was authorized to do business in this state, *Gendler*, *supra*, 102 N.J. at 467, 508 A.2d 1127, and that company's use of another wholly-owned

subsidiary that sold its products to a New Jersey corporation for eventual sale to plaintiff. *Ibid.* Moreover, the foreign corporation in *Gendler* conceded that the sale in New Jersey was "not an isolated transaction," *ibid.*, but was part of larger and "[d]eliberate sales efforts," *id.* at 469, 508 A.2d 1127, aimed at this state. Likewise, in *Asahi*, the foreign manufacturer's distribution system resulted in what Justice Brennan described as "regular and extensive sales" of its product for use as a component part in products sold in the state seeking to assert jurisdiction. *Asahi, supra*, 480 U.S. at 121, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110.

Nothing in this record approaches the sort of "distribution scheme" to which those precedents referred. Instead, we are confronted with a foreign manufacturer that chose an entirely distinct, unaffiliated Ohio corporation to serve as its distributor, that had little, if any, success in its efforts to control or direct that entity's activities, that sent a representative to trade shows somewhere in this country from time to time, and whose independent distributor made but one sale of a machine that ended up in this state. Notwithstanding that record, through clever repetition of phrases like "distribution scheme," the majority transforms what might at most be described as a trickle of goods into a flood of products sufficient to meet the demands of due process when, in truth, the facts fall short. Apparently mindful of Justice Brennan's caution that we not equate stream of commerce with the "unpredictable currents and eddies, but to the regular and anticipated flow of its products," *see id.* at 117, 107

S. Ct. at 1034, 94 L. Ed. 2d at 107, the majority mischaracterizes the record to achieve precisely that end.

Second, the record is barren of the kind of targeting that this Court in *Gendler* and the United States Supreme Court in *Asahi* considered. In each of those opinions, the Courts evaluated the manufacturer's connection with the particular forum and utilized the stream of commerce to the extent that it played a role as the vehicle for getting the product to that forum. For example, in *Gendler*, one could conclude that there was an effort to access and exploit a market in New Jersey because the manufacturer utilized an alter ego, a wholly-owned subsidiary doing business here, and engaged in "[d]eliberate sales efforts" aimed at this state. *Gendler*, *supra*, 102 N.J. at 469, 508 A.2d 1127. In *Asahi*, although the record was hardly extensive, both of the opinions are clear about what is required, at a minimum, for this element of the test. For Justice O'Connor, it remains purposeful availment as evidenced through conduct aimed at a particular forum's market, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104; for Justice Brennan, it requires affirmative awareness that the stream of commerce is being used to market the product in the target state, *id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Nothing in this record rises to that level, for there is no evidence that the foreign corporation made any effort to send its products here; there is nothing more than a decision to market its product somewhere within

this nation. Ignoring this Court's plain command in *Gendler* that the "crucial question" includes a "system of distribution that is purposefully directed at New Jersey residents," *Gendler, supra*, 102 N.J. at 484, 508 A.2d 1127, the majority simply replaces targeting of this state, which would comport with due process, with a generic effort toward the whole of the United States, which does not.

The majority has, in reality, redefined the crucial jurisdictional terms to suit its ends. Affixing the wholly unwarranted label of "distribution scheme" now takes the place of explaining how the marketing efforts in this record rise to the level contemplated by that phrase in *Gendler* or *Asahi*. Redefining the target market from this forum to "a geographical market that includes New Jersey," *ante* at (slip op. at 3), masks the fact that there was no focus on this state. These are subtle shifts in emphasis indeed, but they are intentional ones, utilized to accomplish the majority's goal of transforming the due process requirement that there be a connection between the foreign entity and the forum state into a test in which the mere act of placing a product into the general stream of commerce somewhere in this nation will suffice. Justice O'Connor and Justice Brennan both rejected such a view, and the suggestion that somehow in *Gendler* this Court did otherwise is false.

Merely including extensive quotations from *Gendler*, and from the competing plurality opinions in *Asahi*, does not equate with analytical faithfulness to the principles on which those cases rest. Citing *Gendler's*

language about the global economy and about modern methods for distribution of allegedly dangerous products, as if those concerns alone support jurisdiction over a non-resident, misses the entire point of the *Gendler* analysis. Likewise, quoting from the opinions in *Asahi* without appreciating the fine distinctions about whether purposeful availment is tested by the additional conduct of the manufacturer, or by awareness of a regular and extensive distribution scheme, ignores the thorny constitutional questions those Courts, and this one, must confront fairly and squarely.

Instead of recognizing that in each of those opinions the stream of commerce is the beginning, and not the end, of the inquiry into jurisdiction, the majority has contorted the stream of commerce theory to its own ends. By ignoring the second half of the *Gendler* test, that is, the element of purposeful direction at New Jersey residents, *Gendler*, *supra*, 102 N.J. at 484, 508 A.2d 1127, the majority has transformed the analysis of the due process demands of jurisdiction into a single question: was a product introduced into the stream of commerce somewhere in the United States, eventually ending up here. That approach is not only circular and simplistic, it is, in the end, an unconstitutional one, because it is starkly inconsistent with fundamental notions of fairness and due process that this Court and the United States Supreme Court have identified as the touchstone of jurisdiction.

I part company with the majority's opinion because it fails to recognize that what gives content to the stream

of commerce theory is the manufacturer's conduct, or knowledge, or awareness of what others were doing with its product. It is those elements that satisfy the traditional component of purposeful availment and that, therefore, permit an exercise of jurisdiction that does not offend the outermost bounds of due process. Any jurisdictional inquiry must contend with the accepted two-part test, through which we recognize that due process demands some act, some evidence, some proof of affirmative awareness, that one's actions will likely result in a sale in the forum state. Because the majority has substituted any act, or potentially no act at all, that can be equated with permitting one's product to enter generally into the stream of commerce for that essential component of our due process analysis, I cannot agree.

III.

I part from my colleagues for a separate reason, albeit one that requires only a brief exposition. In *World-Wide Volkswagen*, the United States Supreme Court commented that part of deciding whether it is reasonable to require a nonresident corporation to defend itself in a particular forum includes an analysis of factors other than those that focus on defendant alone. The Court noted:

> [T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute[,] . . . the plaintiff's

> interest in obtaining convenient and effective relief[,] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies[.]
>
> [*World-Wide Volkswagen, supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498 (citations omitted).]

Through this language, the Supreme Court made plain that the essential focus of the due process analysis must be on defendant and its relationship to the forum, and that the other considerations play a subsidiary role should the court conclude that there are sufficient contacts to support jurisdiction. In each of the decisions of that Court, the focus of the jurisdictional analysis is on defendant and its behavior or activities, rather than on plaintiff and his or her injuries or damages. The United States Supreme Court, although reciting facts relating to the damage or injury alleged, has done so in a cursory fashion, presumably to ensure that sympathy for an injured plaintiff would not shift the focus away from the due process rights of the nonresident defendant. *See, e.g., Asahi, supra*, 480 U.S. at 105, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100 (noting that plaintiff was "severely injured"); *World-Wide Volkswagen, supra*, 444 U.S. at 288, 100 S. Ct. at 562, 62 L. Ed. 2d at 495 (noting that plaintiffs were "severely burned" when their car caught fire after accident with another vehicle).

Appendix B

Apparently concluding that an appropriate evaluation of defendant's due process rights should instead be conducted only in the context of a full explanation of the factual assertions, the majority engages in an unnecessarily detailed description of plaintiff's severe injuries, coupled with repeated references to defendant's "dangerous" machine as the cause. That all of us desire to make certain that our citizens have access to our courts, that all of us agree that we should make a forum available so that injured individuals can achieve justice and fair compensation for their injuries caused by the negligence of others, is a given. But in this appeal, involving a dispute on a matter as to which the seriousness of the injury or the fault of the manufacturer is largely irrelevant, the majority's election to make such considerations so great a part of its reasoning suggests a disturbing shift in focus in two ways.

First, the majority rather inexplicably uses the fact of plaintiff's severe injuries to support its jurisdictional analysis, commenting that this newly adopted test applies in products liability cases, *ante* at (slip op. at 2), and observing that lesser injuries somehow might not be sufficient to support jurisdiction, *ante* at (slip op. at n.13). Apparently, the majority's stream of commerce approach would not, in these same factual circumstances, afford sufficient basis for us to grant the machine's corporate owner access to our courts if it sought to pursue a contract or warranty claim. Likewise, the usual focus on due process as it applies to a foreign defendant now turns in some never explained fashion

on whether the plaintiff includes the right sort of claim in the pleading and has injuries that the majority considers worthy of concern. In either case, those comments evidence a new, unexplained and unfounded approach to jurisdiction.

The majority therefore, sadly, creates a new rule only for the class of claims and claimants it favors, rather than one that applies to all like-situated matters and litigants. Indeed, the proof of that may be found in the supremely ironic fact that, on the same date on which we heard oral argument in this appeal, we issued our unanimous opinion in *McKesson Corp. v. Hackensack Medical Imaging*, 197 N.J. 262, 962 A.2d 1076 (2009). The Court there, using language that the majority today echoes, commented that "[i]n today's rapidly shrinking world, the purchase of goods from out-of-state vendors has become commonplace." *Id.* at 278, 962 A.2d 1076. Contrary to the majority's conclusion that for some plaintiffs, that fact alone supports the exercise of jurisdiction, this Court in *McKesson* utilized our traditional due process approach, cautioning that "[t]hose instances, standing alone, are insufficient to establish the requisite minimum contacts needed to invoke long-arm jurisdiction consistent with due process." *Ibid.*

Second, the majority opinion includes a change in focus from an appropriate analysis of a defendant's due process rights to concerns that plaintiffs be assured of access to the most convenient forum. Particularly troubling in this regard is the end of the opinion, in

which the majority appears to address two issues without benefit of briefing or argument. First, engaging in a discussion that should properly be characterized as a *forum non conveniens* analysis and, second, baldly asserting that our substantive law will apply, *ante* at (slip op. at 44), the majority seeks to add support for its conclusion that defendant should be forced to defend itself here. Whether a dispassionate *forum non conveniens* or choice of law analysis would yield that result is of no consequence; the inclusion of those points, as if the outcome is self-evident, betrays a majority that has lost sight of the fact that the focus of the analysis of due process and jurisdiction should be on defendant.

Because the majority opinion is pervaded by expressions of concern for plaintiff, his particular cause of action, the severity of his injuries and his interests, and because it has shifted from fairness to the nonresident defendant as the "primary concern," *see World-Wide Volkswagen*, *supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498, of a jurisdictional analysis, I respectfully dissent.

IV.

The version of the stream of commerce theory that the majority uses is a radical departure from the articulations of that theory as embraced by this Court in *Gendler*, and by the opinions of the United States Supreme Court in *Asahi*. It shatters the traditional, constitutionally-required ties between jurisdiction and connection with the forum, instead concluding that the

mere happenstance of a product finding its way here is sufficient indicia of foreseeability or availment or awareness which has long been the hallmark of due process. It avoids faithful application of the fundamental fairness concerns that have long guided this Court, and the United States Supreme Court, by relying on circular rhetoric about the global economy as if that alone comports with due process. In the end, the majority has replaced a carefully balanced test, albeit one with some slightly varying emphases, but that remained true to our notions of due process, with an unbounded one that presumes that participation in the global economy, without more, bespeaks purposeful availment of the benefits of this jurisdiction. I respectfully dissent.

JUSTICE RIVERA-SOTO joins in this opinion.

APPENDIX C DISSENTING OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY
A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

JUSTICE RIVERA-SOTO, dissenting.

In all respects, I wholeheartedly join in Justice Hoens's thoughtful, comprehensive and scholarly dissent. I write separately, however, solely to urge explicitly a point implied in Justice Hoens's dissent.

Appendix C

The majority's decision implicates and, in large and sweeping swaths, upends established notions of constitutional decision making that form the bedrock of our federal system. In so doing, it offends those core federalist concepts that rightly and prudentially limit the exercise of any one state's judicial power via the invocation of long-arm jurisprudence. It, therefore, cannot be allowed to stand. Because the majority "has decided an important federal question in a way that conflicts with" settled federal constitutional principles, Sup. Ct. R. 10(b), creates a new, insubstantial, and meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.

APPENDIX D OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 9, 2008

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
DOCKET NO. A-1755-06T5

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Appellants

v.

McINTYRE MACHINERY AMERICA, LTD.,
J. McINTYRE MACHINERY LTD.,

Defendants-Respondents.

Argued October 3, 2007 – Decided April 9, 2008

LISA , J.A.D.

The issue in this case is whether New Jersey courts can assert long-arm jurisdiction over the British manufacturer of an industrial machine, which plaintiff alleges was defectively designed and caused him to be injured in a workplace accident in New Jersey. Plaintiff's employer purchased the machine new from the manufacturer's exclusive United States distributor, an Ohio corporation, after the employer attended a national trade convention in Las Vegas, Nevada and learned about the machine at a booth exhibit jointly operated

by the manufacturer and distributor. The manufacturer had no physical presence in New Jersey and asserted that it had no control over the activities of its United States distributor and had no knowledge of the domiciles of buyers to whom the distributor sold defendant's machines after defendant transferred title to the machines and shipped them to the distributor in Ohio. The trial court concluded that plaintiff failed to establish that defendant had sufficient minimum contacts with New Jersey to subject it to personal jurisdiction, and that even under the most liberal form of the stream-of-commerce theory, defendant would not be subject to personal jurisdiction in New Jersey.

We conclude that sufficient minimum contacts exist under the "stream-of-commerce plus" rationale espoused by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92, 104 (1987). We further conclude that entertainment of jurisdiction in New Jersey would not offend traditional notions of fair play and substantial justice. Accordingly, we reverse the order dismissing the complaint against the manufacturer for lack of personal jurisdiction.

J. McIntyre Machinery, Ltd. (defendant), a British corporation based in Nottingham, England, is in the business of manufacturing shearing machines used in scrap metal recycling operations. McIntyre Machinery America, Ltd. (McIntyre America), an Ohio corporation with its principal place of business in Stow, Ohio, was defendant's exclusive distributor in the United States

prior to going bankrupt in 2001. McIntyre America was not a subsidiary of defendant and there was no commonality of ownership or management of the two companies. They were independent corporate entities. There was apparently no written contract between the two companies, but the record reveals a close ongoing business relationship in which they cooperated in selling defendant's products to United States industrial customers.

Plaintiff, Robert Nicastro, a New Jersey resident, was employed by Curcio Scrap Metal in Saddle Brook. On October 11, 2001, plaintiffs hand became lodged in a shearing machine he was operating, causing him severe injuries. The machine was a Model 640 Shear manufactured in 1995 by defendant in England. The machine is about eight feet long and six feet high and weighs more than three tons.

In 1994 or 1995, Frank Curcio, the owner of Curcio Scrap Metal, attended the Institute of Scrap Recycling Industries (ISRI) convention in Las Vegas, Nevada. He visited an exhibitor's booth jointly operated by defendant and McIntyre America and obtained information about the Model 640, with which he was not previously familiar. Curcio learned that the machine was manufactured by defendant in England and distributed throughout the United States by its sole United States distributor, McIntyre America. Based upon that contact, Curcio ordered the machine.

Appendix D

Defendant shipped the machine from England to McIntyre America in Ohio, which then shipped it to Curcio Scrap Metal in Saddle Brook. The purchase price was $ 24,900, as reflected in the August 25, 1995 invoice issued by McIntyre America to Curcio Scrap Metal. The invoice described McIntyre America as "America's Link to Quality Metal Processing Equipment."

The machine came with an instruction manual bearing on its cover defendant's name, with a sticker affixed containing McIntyre America's name. The manual advised that owners and operators must familiarize themselves and comply with specified safety standards issued in the United Kingdom and the United States, and set forth sources in both countries for applicable "working practices and regulations."

Defendant's president attended the ISRI conventions in Las Vegas in 1994 and 1995, which Frank Curcio attended. The president attended ISRI conventions each year from 1990 through 2002, held in various cities in the United States. Some years, he was accompanied by one or two other management level officers of defendant. Defendant's management level personnel also attended exhibitions, conferences and annual meetings of other United States trade organizations in the scrap metal industry.

Notwithstanding the apparent absence of a written contract, defendant does not dispute that McIntyre America was its sole United States distributor during the relevant time period. Evidence in the record

illuminates to some extent the nature of the relationship between the two companies regarding the sale of defendant's machines in the United States.

Defendant did not own property, maintain an office or bank account, or have employees in New Jersey. It was not licensed to do business in New Jersey and had no registered agent here. Its former managing director, Sally Johnson, certified that defendant "does not *directly* market, sell or solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. McIntyre does not, and never did, employ a sales staff in or for the United States." (emphasis added).

In a January 13, 1999 letter to McIntyre America, Johnson expressed concern over apparent disputes developing between the two companies and stated that she and "the Boss" would come to the United States to meet with McIntyre America's representatives within the next few days "to see how we can get things back on an even keel and move the businesses forwards [sic]." Johnson stated that defendant would arrange for collection of some of its unsold machines and equipment (other than Model 640s), "which should help to get your storage costs down." She then stated:

> I note also that you have 3 640s unsold which I understood to have been sent out against firm orders otherwise we wouldn't have built them! Perhaps we should also look at bringing a couple of those back also. It is important for us to try to turn some of your stock into cash

> as quickly as possible, since it is presently costing us £ 20,000 per year to fund it. If we can get the stock levels down, then we could look again at machine costings and perhaps in the short term try to send out fewer machines but give you more margin on them.

In a November 23, 1999 communication from defendant's president to McIntyre America, it is evident that the difficulties between the two companies continued. He stated:

> As you know, we are unhappy with the present situation. All we wish to do is sell our products in the States and get paid! If this isn't possible then the only other option open to us is for us to split up in an amicable fashion as quickly as we can. I note that you still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full.

During the interim period, on April 23, 1999, McIntyre America communicated with Johnson, referencing "what we discussed at ISRI" regarding "commissions." Apparently, McIntyre America took a "commission" on a sale before defendant was "paid by the customer for it." McIntyre America assured defendant that "[w]e do not plan to collect our commissions in this fashion on an ongoing basis," but

explained that it was in a tight cash flow position at that time. McIntyre America assured defendant:

> We have no problem waiting for you to receive payment from the customer first before requesting our commission via a comp[an]y invoice in the future. It was not our intention to upset you or your books over in England with our actions. That's why I paid you for the 407 shear, that we just got payment for by check, even though it has not even had time to clear our bank! We have all worked very hard to build up confidence in each other and we have no desire to jeopardize those strides. I have faxed over an invoice for the commission today, and I will send you out a hard copy in the mail.

These communications support the reasonable inference that defendant retained a significant measure of control over the level of McIntyre America's inventory of defendant's machines, which remained defendant's property until McIntyre America sold them to United States customers. It is also reasonable to infer that defendant dictated the "margin" or "commission" McIntyre America would receive when a sale was accomplished. It is thus evident that the two companies were acting closely in concert with each other to sell defendant's machines to customers throughout the United States, through a distribution system in which McIntyre America was a conduit for the sales.

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Although our minimum contacts analysis focuses on the time-frame leading up to the sale of the product, we consider subsequent conduct by defendant for the limited purpose of supporting reasonable inferences that relate back to its conduct at the critical time. In addition to that which we have already described regarding direct dealings between defendant and McIntyre America, other uncontroverted conduct and statements by defendant demonstrate its continuing course of conduct with successors to McIntyre America, as defendant's exclusive distributors, and defendant's continuing activities directed at selling its products to United States customers through these exclusive distributors.

An article in a trade publication, Recycling Today, in May 2002, announced that defendant appointed Recycling Equipment Corp. (REC), of Pennsylvania, as its "exclusive North American distributor." The article described the first United States sale of a particular shear machine model to a Tennessee purchaser, and elaborated: "The machine was exhibited at the recent ISRI convention in Las Vegas, and was purchased from the J. McIntyre Machinery Ltd. booth." Information in the article was attributed to Sally Johnson. The article stated: "Although McIntyre shears are well established in America, this is the first shipment to the U.S. in more than 18 months, following the demise of J. McIntyre Machinery Ltd.'s former distributor, McIntyre America." Then, Johnson was quoted as saying, "We had a fantastic ISRI show with our new distributor REC. . . . We received strong inquiries, and it is actually some

years since we sold a shear off the stand at an American exhibition."

REC was then replaced by Strip Technology, Inc. (Strip-Tec), of Texas, as defendant's exclusive United States distributor. In October 2003, this article appeared in Recycling Today:

> Strip Technology Inc. (Strip-Tec), Fort Worth, Texas, has recently ordered its second container load of alligator shears manufactured by J. McIntyre Machinery Ltd., Dunkirk, U.K.
>
> "Since having been appointed sole agents for the McIntyre shear range only six months ago, Strip-Tec has placed an order for its second container of equipment," a news release from the British equipment maker states.
>
> Strip-Tec president Bobby Alexander says his company is carrying J. McIntyre shears in stock at the company's facility in Fort Worth while also holding a spare parts inventory to offer "excellent back-up support for the McIntyre shear range."
>
> Sally Johnson, J. McIntyre's managing director, has also advised North American buyers to deal only with Strip Tec for the purchase of new J. McIntyre shears.

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"J. McIntyre Machinery is keen to stress that Strip Tec is now the only company authorized to sell new McIntyre equipment following the demise of our former agent McIntyre America in 2001," says Johnson, referring to a former Ohio-based distributor.

Johnson has asked recyclers who learn of any North American companies offering new McIntyre shears other than Strip Tec "or its appointed representatives" to contact Strip Tec in the U.S. at (800) 426-4126 or J. McIntyre Machinery Ltd in the U.K. at &8F44 115-900-3650. "These machines may not have been authorized for sale by the manufacturer, and as such may be being sold illegally and without the latest operating instructions, warning labels and operator guarding," Johnson says of equipment offered in North America by someone other than Strip Tec.

Johnson also says any McIntyre customers who purchased their machines from the prior distributor "are encouraged to register their equipment with Strip-Tec in order to receive information on latest equipment updates and allow McIntyre and Strip-Tec to offer full support and competitive pricing on genuine McIntyre spare parts."

Curcio does not contend that it utilized the trade publication articles as sources of information for the

machine it purchased. And, of course, we realize that the articles we have quoted did not involve McIntyre America, but its successors. Nevertheless, the evidence supports defendant's continuing outreach for United States sales of its machines and parts through its exclusive United States distributor and no one else. The articles specifically mention McIntyre America. It is reasonable to infer that the arrangements were similar during McIntyre America's tenure as defendant's exclusive United States distributor.

The trial court found that defendant "does not have a single contact with New Jersey short of the machine in question ending up in this state." The court deemed it critical that the manufacturer and distributor were "entirely separate business entit[ies]." Apparently accepting the statement in Johnson's certification that defendant "had no knowledge of the business dealings between [McIntyre America] and its customers, including Curcio, concerning the at-issue shear," the court found "no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey." The court therefore concluded that no basis for personal jurisdiction was established, either under the traditional minimum contacts test or the stream-of-commerce theory.[1]

1. The order dismissing the complaint now under review was entered on November 3, 2006. A prior order, entered on March 5, 2004, dismissed the complaint for lack of personal

(Cont'd)

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New Jersey's equivalent of a long-arm statute, *Rule* 4:4-4(b)(1), permits service of process on a non-resident defendant "consistent with due process of law." Accordingly, New Jersey courts have allowed out-of-state service to the outermost limits permitted by the United States Constitution. *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971).

Due process requires that a defendant who is not physically present have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 236 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)). "Minimum contacts" is understood to require that a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958). The purpose of the minimum contacts doctrine is to protect a defendant against litigating in an inconvenient forum and to ensure that states do not exceed their jurisdictional limits.

(Cont'd)

jurisdiction. Plaintiffs appealed and we reversed and remanded to allow jurisdictional discovery. *Nicastro v. McIntyre Mach. Am., Ltd.*, No. A-3891-03T1 (App.Div. May 26, 2005). After that discovery was conducted, defendant again moved for dismissal, which was granted by the November 3, 2006 order.

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World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498 (1980). The doctrine has been relaxed substantially over the years because of the fundamental transformation in the American economy, commonly involving interstate business transactions without physical presence. *Id.* at 292-93, 100 S. Ct. at 565, 62 L. Ed. 2d at 498.

The due process analysis requires consideration of whether the defendant should reasonably anticipate being haled into court in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985). It must be shown that the defendant has purposefully availed itself of the privilege of engaging in activities within the forum state, thus gaining the benefits and protections of its laws. *Id.* at 475, 105 S. Ct. at 2183, 85 L. Ed. 2d at 542. The purposeful availment requirement protects defendants against being haled into court in a foreign jurisdiction solely on the basis of random, fortuitous, or attenuated contacts, or as a result of the unilateral activity of some other party. *Ibid.*

If a plaintiff succeeds in establishing sufficient minimum contacts, the court must also determine whether entertaining jurisdiction would be consistent with considerations of fair play and substantial justice. *Id.* at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 543; *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322, 558 A.2d 1252 (1989).

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More than fifty years ago, the United States Supreme Court recognized that the minimum contacts basis as an alternative to the requirement of physical presence for the assertion of *in personam* jurisdiction was justified by the "increasing nationalization of commerce," in which many business transactions were conducted across state lines, and the corresponding improvements in modern transportation and communication that made it less burdensome for a party sued to defend himself in a state where he engages in economic activity. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957). In *World-Wide Volkswagen*, *supra* the Court observed that these "historical developments . . . have only accelerated in the generation since /*McGee*/ was decided." 444 U.S. at 293, 100 S. Ct. at 565, 62 L. Ed. 2d at 498-99.

Another generation has now passed since *World-Wide Volkswagen* was decided in 1980, and "the acceleration in the internationalization of commerce is apparent." *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir.), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994). With increased globalization of commerce, "it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states." *Ibid.* At the same time, however, a countervailing policy consideration cautions that particularly careful inquiry must be made into the reasonableness of the assertion of jurisdiction over an

alien defendant, and courts should be unwilling to find the serious burdens on an alien defendant of having to litigate in a foreign country outweighed by only minimal interest on the part of a plaintiff or the forum state. *Asahi, supra*, 480 U.S. at 115, 107 S. Ct. at 1034, 94 L. Ed. 2d at 106-07.

In the minimum-contacts analysis, courts distinguish between specific and general jurisdiction. *Wilson v. Paradise Vill. Beach Resort & Spa*, 395 N.J. Super. 520, 527, 929 A.2d 1122 (App.Div.2007). "Although the minimum-contacts test centers on the defendant's relationship with the forum state, the sufficiency of the contacts for jurisdictional purposes depends on 'the relationship among the defendant, the forum, and the litigation * * *.'" *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 471, 508 A.2d 1127 (1986) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580, 53 L. Ed. 2d 683, 698 (1977)). When the cause of action is unrelated to the defendant's contacts with the forum state, the court's jurisdiction is general, and continuous and substantial contacts are required. *Id.* at 471-72, 508 A.2d 1127. However, when the cause of action arises directly out of the defendant's contact with the forum state, the court's jurisdiction is specific, and an isolated act by the defendant may be sufficient to support jurisdiction over that defendant. *Id.* at 471, 508 A.2d 1127. Jurisdiction is more likely to be found when the cause of action arises directly out of the defendant's contacts with the forum state. *Ibid.* Because plaintiffs cause of action arises directly out of the sale to a New Jersey purchaser for use in New Jersey of the

shear machine that allegedly caused plaintiff's injury, this is a case of specific jurisdiction.

In *World-Wide Volkswagen*, *supra* the United States Supreme Court adopted the stream-of-commerce theory as a basis for establishing minimum contacts, 444 U.S. at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d at 501-02, and the Court reiterated its commitment to the theory in *Burger King*, *supra*, 471 U.S. at 473, 105 S. Ct. at 2182, 85 L. Ed. 2d at 541. In 1986, in *Charles Gendler*, *supra* the New Jersey Supreme Court adopted the stream-of-commerce theory, and explained it this way:

> In *World-Wide Volkswagen*, the Supreme Court noted that the stream-of-commerce theory would apply to subject foreign manufacturers and major distributors, but not local retailers or distributors, to jurisdiction in the states where their products were eventually shipped and sold. The foreseeable market served by local retailers and distributors, which are at the end of the distribution chain, is constrained. In contrast, manufacturers and distributors, which are at the start of a distribution chain, serve a larger market and purposely conduct their activities to make their product available for purchase in as many forums as possible. For such a manufacturer, the sale of its product in a distant state is not simply an isolated event, but the result of the corporation's efforts to cultivate the largest possible market for its

product. Because the manufacturer and primary distributor intend to serve and derive benefits from a larger market, it is fair to subject them to jurisdiction, while excusing a secondary distributor or retailer.

As observed in several cases, foreign manufacturers derive benefits from the indirect sale of their products throughout the United States. By increasing the distribution of its products, the manufacturer not only benefits economically from indirect sales to forum residents, but also benefits from the protection provided by the laws of the forum state. Thus, a manufacturer that distributes its products into the stream of commerce for widespread distribution derives both legal and economic benefits from the states in which its products are sold. In sum, the system through which the manufacturer distributes its products evidences the manufacturer's purposeful penetration of the market.

A foreign manufacturer that purposefully avails itself of those benefits should be subject to personal jurisdiction, even though its products are distributed by independent companies or by an independent, but wholly-owned, subsidiary. In today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States. Instead, these manufacturers

employ middlemen, many of whom are often independent, to act as their distribution arms. To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit a legal technicality to subvert justice and economic reality in the worst sense. Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products. Thus, the stream-of-commerce theory supports personal jurisdiction over foreign manufacturers that derive benefits from the distribution and sale of their products in the United States.

As applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state. The manufacturer's awareness of the distribution system satisfies the requirement that the manufacturer have a reasonable expectation that its products will be purchased in the forum state. It makes no difference whether the manufacturer had actual or constructive knowledge of the distribution system. A manufacturer that should have known, like one that actually

knows, that its products will be sold in the forum state purposefully avails itself of the benefits of the forum's laws.

By definition, a stream-of-commerce case involves a sale not by the manufacturer, but by another entity in the chain of distribution. To be subject to the stream-of-commerce theory in some jurisdictions, the manufacturer must purposefully participate in or control the distribution of its products. We believe, however, that a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state. The focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products. A manufacturer's establishment or control of a distribution system, of course, satisfies the requirement that the manufacturer was aware of that distribution system.

A manufacturer's awareness of the distribution system, through which it receives economic and legal benefits, justifies subjecting the manufacturer to the jurisdiction of every forum within its distributors' market area. Accordingly, a manufacturer that knows its products are

> distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state.
>
> [102 N.J. at 477-481, 508 A.2d 1127 (citations and quotation marks omitted).]

Less than a year after our Supreme Court decided *Charles Gendler*, the United States Supreme Court decided *Asahi*, in which it sought to refine the boundaries of the stream-of-commerce theory. The Court split four-four-one. Writing for four members of the Court, Justice O'Connor espoused the view that the stream-of-commerce theory required a showing of an action of the defendant purposefully directed toward the forum state, and that the placement of a product into the stream of commerce, without more, would not fulfill that requirement. *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. In her view, "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Ibid.* However, mere awareness that the stream of commerce might sweep the product into the forum state would not convert the mere act of placing the product into the stream of

commerce into an act purposefully directed toward the forum state. *Ibid.* Justice O'Connor pointed out that although the foreign manufacturer in *Asahi* might have been aware that some of its component products would be incorporated into other products ultimately sold in California, the manufacturer "did not create, control, or employ the distribution system that brought its valves to California," *id.* at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104-05, suggesting that the result might have been different if one of those circumstances were present.

Justice Brennan, writing for four members of the Court, rejected Justice O'Connor's "additional conduct" requirement. *Id.* at 116-21, 107 S. Ct. at 1034-37, 94 L. Ed. 2d at 107-10. In his view, the purposeful availment requirement is satisfied by placement of a product in the stream of commerce with an awareness that the final product is being marketed in the forum state, because, by definition, the stream-of-commerce "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distributor to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

The New Jersey Supreme Court next had the occasion to consider the stream-of-commerce theory in *Lebel*, *supra* in which it announced that until the United States Supreme Court, "as the umpire of federalism," more clearly "draws the lines" defining the theory, the New Jersey Supreme Court would "hew closely to the limited fundamentals about which there is little or no dispute or debate." 115 N.J. at 319-20, 558 A.2d 1252.

The Court proceeded to decide the case, finding jurisdiction based on traditional minimum contacts principles. *Id.* at 321-29, 558 A.2d 1252.

This court has interpreted our Supreme Court's announcement in *Lebel* as not a rejection of the stream-of-commerce theory, but an admonition to avoid use of the theory as the basis for a jurisdictional decision if jurisdiction can be sustained on traditional minimum-contacts analysis. *Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66, 72, 600 A.2d 1238 (App.Div.), *certif. denied*, 130 N.J. 9, 611 A.2d 648 (1992). Judge Pressler there analyzed the disposition in *Asahi*, and pointed out that all nine Justices agreed that because the injured plaintiff's claim against all defendants was settled, and all that remained to the litigation was an indemnification claim between two alien corporations, California's exercise of jurisdiction for the sole purpose of adjudicating that claim would offend traditional notions of fair play and substantial justice. *Id.* at 70-71, 600 A.2d 1238. The entire Court agreed that California's minimal interest in the remaining aspect of the dispute was outweighed by the undue litigative burden that would be placed on an alien corporation if compelled to resolve the dispute in a California court. *Id.* at 71, 600 A.2d 1238. As a result, the disagreement between the Justices regarding the precise parameters of the stream-of-commerce theory was somewhat minimized. *Ibid.*

The Eighth Circuit, based upon a similar analysis, concluded that, "*Asahi* [ ] stands for no more than that it is unreasonable to adjudicate third-party litigation

between two foreign companies in this country absent consent by the nonresident defendant." *Barone, supra*, 25 F.3d at 614. The court noted, "'Because the [United States] Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative.'" *Ibid.* (quoting *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir.1992)).

We agree that the stream-of-commerce theory remains viable, and note that it "has achieved fairly wide acceptance in the federal courts." *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed.Cir.1994). We are unable in this case to conclude that application of traditional minimum contacts principles will result in a finding of jurisdiction. Accordingly, because we are convinced that the stream-of-commerce theory remains viable, we apply it.

While some courts have utilized Justice Brennan's pure stream-of-commerce rationale, we find it unnecessary to do so in this case. Instead, we follow those courts that have taken the more cautious approach by applying Justice O'Connor's more restrictive rationale, which has come to be known as "stream-of-commerce plus." *See* 16 James W. Moore et al., *Moore's Federal Practice* Civil § 108.42 nn. 35 & 36 (3d ed. 2008)(discussing *post-Asahi* federal cases adopting Justice O'Connor's "stream-of-commerce plus" rationale as compared to federal cases adopting Justice Brennan's traditional stream-of-commerce theory). The more restrictive approach, of course, encompasses the less restrictive one.

Therefore, in order to determine whether New Jersey courts have personal jurisdiction over defendant, we must evaluate whether defendant, in addition to placing the shear machine that injured plaintiff into the stream of commerce by transferring it to its distributor, McIntyre America, with an awareness that its machine might end up in New Jersey, also engaged in additional conduct indicating an intent or purpose to serve the New Jersey market. *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104.

Defendant designated McIntyre America as its exclusive distributor for the entire United States. Therefore, anyone in any state that wished to purchase one of defendant's machines was required to purchase it from McIntyre America, defendant's exclusive sales agent in this country. This was not a temporary or fleeting arrangement. From at least as early as 1995, when Curcio purchased the machine, until its bankruptcy in 2001, McIntyre America enjoyed this relationship with defendant on an ongoing basis. The relationship was established by defendant for the purpose of selling its machines in all fifty states. The machines were designed to conform with United States standards as well as those in the United Kingdom. McIntyre America traded on defendant's name and held itself out as "America's Link to Quality Metal Processing Equipment."

Defendant attempts to avoid a finding of sufficient minimum contacts because (1) McIntyre America was a separate and independent business entity, (2) McIntyre

America, not defendant, sold the machines to customers (including Curcio), and (3) defendant had no knowledge of the identity or whereabouts of the customers to whom McIntyre America sold. We reject defendant's arguments.

Defendant was well aware that McIntyre America was not the end user of the many machines it sold to McIntyre America over the years. By definition, McIntyre America was defendant's distributor and its function was to resell the machines to end users. These are large, potentially dangerous, industrial machines, designed for a limited market of users engaged in the metal recycling industry. The machines are designed for use in a stationary location in an industrial setting. Thus, it would reasonably be anticipated by defendant and McIntyre America that upon sale to the end user, the machine would remain at its location for use by workers there.

When defendant sold and shipped machines to McIntyre America in Ohio, defendant did not do so with the purpose of availing itself of the Ohio market. When defendant's senior management personnel attended trade conventions in Las Vegas and other United States cities to display its machines and seek buyers for them (through McIntyre America), its purpose was not to sell machines for use in Las Vegas or those other cities. Defendant was engaged in purposeful conduct to avail itself of the entire United States market, namely to effect sales, through its exclusive distributor, to end users in all fifty states, including New Jersey.

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The sale of the machine to Curcio was not the result of conduct by a party unrelated to defendant and it was not an isolated transaction. It was the result of the very distribution scheme purposefully established by defendant for the sale of its machines to potential customers located anywhere within the exclusive sales territory of McIntyre America. That territory included New Jersey.

Applying Justice O'Connor's stream-of-commerce formulation in similar situations, courts have held that sales by distributors to customers within their distribution territory, pursuant to distribution arrangements established by the manufacturer, exposed the manufacturer to specific *in personam* jurisdiction for claims arising out of those sales. This is the very type of "additional conduct" Justice O'Connor suggested as sufficient to satisfy the purposeful availment requirement, namely "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. 1032, 94 L. Ed. 2d at 104. We discuss a sampling of such cases.

The Supreme Court of Arizona found jurisdiction over an Italian firearm's manufacturer which sold guns, manufactured to meet United States specifications, to an intermediary distributor F.O.B. Milan, which then sold them to a distributor serving the United States market, which finally sold the gun that was the subject of the litigation to the end user consumer in Tucson, Arizona. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892

P.2d 1354, 1355-65 (1995). An accidental discharge of the gun killed a family member of the purchaser and defective design was alleged. *Id.* at 1356-57. The court rejected defendant's argument that its activities, at best, focused on the United States in general, not Arizona. *Id.* at 1362-64. The court stated:

> Were this true, then no individual state could assert jurisdiction over Defendant simply because Defendant did not target a particular state or group of states but instead intended to sell its product to all of America. The argument turns common sense on its head. Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona, Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America. Given evidence of intent to serve this market, according to Justice O'Connor's opinion in *Asahi* principles of due process permit suit against Defendant in states where its products cause damage.

> Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but

> arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.
>
> [*Id.* at 1362 (quoting *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103).]

The court did "not believe that Plaintiffs must show Defendant's specific intent to sell in Arizona. An intent to sell across America is enough." *Ibid.* Further, rejecting an argument similar to that made by defendant in the case before us, the court said, "We do not believe that a foreign manufacturer that knowingly and intentionally distributes its products in America through an American company can avoid jurisdiction of American courts by the simple expedient of closing its eyes and making no effort to learn about or restrict distributor's activities," noting that a manufacturer has the option of limiting its risk by precluding its distributor from selling its product in particular states. *Id.* at 1362-63.

Addressing the second prong of the due process analysis, fair play and substantial justice, the court concluded that Arizona's interest in protecting the

health and safety of its residents was a substantial state interest. *Id.* at 1364. The accident happened in Arizona, and most witnesses and material evidence was located there. *Ibid.* Those important local interests far outweighed any inconvenience to the defendant in having to litigate the case in Arizona. *Ibid.* Accordingly, the exercise of jurisdiction was fair and reasonable. *Id.* at 1364-65.

Finally, the court noted a public policy consideration, namely that due process should not provide a safe harbor allowing alien corporations to ship potentially dangerous products to the United States, driving American manufacturers out of business while allowing the alien companies to produce, with immunity, dangerous products for distribution in this country. *Id.* at 1363.

In *Fortis Corporate Insurance v. Viken Ship Management*, 450 F.3d 214, 220-22 (6th Cir.2006), the court found a sufficient "plus factor" to impose jurisdiction in Ohio over a Norwegian owner of ocean-going cargo vessels because it outfitted its vessels to ship products to the Great Lakes, and its vessels did make frequent calls to Great Lakes ports over a period of years including Toledo, Ohio. The ship owner chartered a fleet of vessels to a Canadian company for several years to transport cargo on an as-needed basis. *Id.* at 215. The Canadian company then subchartered the ship in question to a United States company to transport goods from Poland to Toledo and en route sea water entered the cargo hold and damaged the goods. *Ibid.*

The court also found the second prong satisfied. *Id.* at 223. Recognizing the caution to exercise great care when dealing with personal jurisdiction in the international field, the court noted that Ohio's strong interest in insuring that shipments to its ports are reliable and the plaintiff's interest in obtaining relief in an Ohio court outweighed any inconvenience to the defendant. *Ibid.*

In a patent infringement case, the Federal Circuit found jurisdiction in Virginia over the Chinese manufacturer of a ceiling fan, transferred from the manufacturer to its New Jersey distributor, which then shipped it to Virginia for sale to customers through an intermediary, Builder's Square. *Beverly Hills Fan Co., supra*, 21 F.3d at 1559-72. The court concluded that from the ongoing relationships between the various parties in the distribution chain, "it can be presumed that the distribution channel formed by [the manufacturer and its New Jersey distributor] and Builder's Square was intentionally established, and that defendants knew, or reasonably could have foreseen, that a termination point of the channel was Virginia." *Id.* at 1564. The manufacturer's sole contact with Virginia resulted from indirect shipments through the stream of commerce. *Ibid.* The court found that specific jurisdiction was established under either version of the stream-of-commerce theory expressed in *Asahi* (including, of course, Justice O'Connor's more restrictive formulation) because the Chinese manufacturer and New Jersey distributor acted "in consort, placed the accused fan in the stream of commerce, they knew the likely destination

of the products, and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there." *Id.* at 1566.

In *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 542-45 (6th Cir), *cert. denied*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993), the court held a Netherlands drug manufacturer subject to *in personam* jurisdiction in Kentucky, in circumstances in which its products were submitted to the Food and Drug Administration (FDA) for approval and then distributed through its exclusive United States distributor to an end user in Kentucky. The court held that the manufacturer's direct efforts in obtaining FDA approval allowed the manufacturer "to avail itself of the vast, lucrative markets of each state in the United States." *Id.* at 543. The manufacturer's licensing agreement with the distributor authorized the distributor to distribute the drug that was the subject of the litigation and allegedly caused harm to plaintiff, throughout its territory, defined in the agreement as "the United States of America, its territories and possessions, and Puerto Rico." *Ibid.* Applying Justice O'Connor's test, the court noted that the manufacturer "made a deliberate decision to market [the drug in question] in all 50 states, including Kentucky, the forum state." *Ibid.* The court went on to explain that the manufacturer

> did not, for example, seek a "New England regional distributor" or a distributor for specific states. It sought and obtained a

> distributor to market its product in each and every state. Even the *Asahi* plurality recognized that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" can "indicate an intent or purpose to serve the market in the forum State."
>
> [*Id.* at 544 (quoting *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104).]

The court also considered as an additional factor that the manufacturer "arguably also kept control over an essential element of the product the package insert." *Ibid.*

The court concluded that the manufacturer could not expect to rely solely on the use of an independent distributor to insulate itself from suit. *Id.* at 544. It submitted its drug application to the FDA for approval, conducted clinical studies in the United States, and sought out a United States distributor to "exploit the United States market." *Ibid.* Thus, the manufacturer did not simply place its product into the stream of commerce but "purposefully availed itself of the privilege of conducting business in all states, including the state of Kentucky." *Ibid.* The court found misguided the manufacturer's argument that it did nothing in particular to purposely avail itself of the forum market, as distinguished from any other state: "If we were to accept defendant's argument on this point, a foreign manufacturer could insulate itself from liability in each

of the fifty states simply by using an independent national distributor to market its products, a result we specifically rejected in [another case]. [The manufacturer] cannot deny that by licensing [its distributor] to distribute [the drug] in all fifty states it employed the distribution system that brought [the drug] to Kentucky." *Ibid.*

The court also found the second prong of the due process test satisfied. *Id.* at 544-45. Applying the more stringent standard pertaining to international defendants, the court found that the interests of the forum state and the plaintiff were very high, in that a Kentucky resident was injured, and those legitimate and important interests outweighed any inconvenience to the alien manufacturer in having to litigate the case in Kentucky. *Id.* at 545.

In the case before us, defendant purposefully established a distribution scheme by which McIntyre America would serve as its conduit for sales of defendant's machines in all fifty states, including New Jersey. Crediting defendant's assertion that it did not know the identity or location of customers to whom McIntyre America sold the machines, we are nevertheless satisfied that defendant's conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey. Additionally, defendant designed the machine that is the subject of this litigation to conform

to United States specifications and requirements, and represented such compliance in the instruction manual that came with the machine. Finally, senior personnel of defendant attended national trade shows in the United States, exhibiting its products jointly with its exclusive United States distributor in an effort to make sales to customers in any or all of the states of the union. Indeed, Frank Curcio attended such a show and visited the joint exhibit of defendant and McIntyre America, which provided him with the information and inducement to purchase the machine that is the subject of this case.

Considering all of the circumstances, we conclude that, under the "stream-of-commerce plus" theory, defendant engaged in purposeful conduct to avail itself of the New Jersey market, thus constituting sufficient minimum contacts with New Jersey to justify the assertion of in personam jurisdiction.

The second prong requires little discussion. Once minimum contacts are established, the burden is on the defendant to present compelling reasons why the interests of fair play and substantial justice would be violated by asserting jurisdiction. *Int'l Shoe*, *supra*, 236 U.S. at 316, 66 S. Ct. 158, 90 L. Ed. at 102. Consideration should be given to several factors in determining the reasonableness of the exercise of jurisdiction in each case, including the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interest of the interstate judicial system in obtaining the most efficient resolution of controversies, and the shared interest of the several

states in furthering fundamental substantive social policies. *World-Wide Volkswagen*, *supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498. In this case, dealing with an alien defendant, we must also be mindful of the need to give great care to the reasonableness inquiry. *Asahi*, *supra*, 480 U.S. at 115, 107 S. Ct. at 1034, 94 L. Ed. 2d at 106-07.

New Jersey has a very strong interest in providing a forum for its injured workers who sustain industrial accidents here. *Cruz*, *supra*, 253 N.J. Super. at 74, 600 A.2d 1238. Plaintiff, of course, shares that interest. New Jersey law will apply in this products liability action. *Ibid.* The machine is here, as are plaintiff, his medical providers and others who will be witnesses, and his employer, the buyer of the machine. *Ibid.*

While litigating the case in New Jersey will cause some inconvenience to defendant, it has shown no lack of ability to litigate the jurisdictional aspects of this case, and the record reveals that it is defending several other cases in various states around the country. By its direct dealings with McIntyre America in Ohio and its attendance at the trade show attended by Frank Curcio in Nevada, defendant may well have been subject to specific jurisdiction in either of those states for the injury caused by this machine, and defendant should have been fully aware of that possibility. Certainly, New Jersey is no more inconvenient to defendant for the litigation than either of those states. And, considering defendant's willingness to travel to the United States to iron out distribution issues with McIntyre America

and to promote sales of its machines at trade shows, we do not deem it unfair or unreasonable to expect it to travel here to respond to claims arising out of the use of its machines.

We have no hesitancy in concluding that subjecting defendant to the jurisdiction of the courts of New Jersey does not offend traditional notions of fair play and substantial justice.

Reversed and remanded.

APPENDIX E ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DISMISSING PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION DATED AND FILED NOVEMBER 3, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-6857-03

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD.; J. McINTYRE MACHINERY LTD.; JOHN DOES 1-10 (fictitious names), and XYZ CORPORATION 1-10 (fictitious names),

Defendants.

ORDER DISMISSING PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION

THIS MATTER, having been opened to the Court by DLA PIPER US LLP, attorneys for Defendant J. McIntyre Machinery, Ltd., and upon due notice to all counsel and for good cause shown;

IT IS, on this 3rd day of November 2006.

ORDERED, that the Complaint in the above-captioned matter be and hereby is dismissed as to defendant J. McIntyre Machinery Ltd for lack of personal jurisdiction; and

IT IS FURTHER ORDERED, that a copy of the within Order be served on all counsel within 7 days of the date hereof.

s/ Elijah L. Miller, Jr.
ELIJAH L. MILLER, JR.
JSC

APPENDIX F MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f) DECIDED NOVEMBER 3, 2006

MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f)

TO: Steven F. Gooby, Esq.
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RE: Nicastro v. McIntyre Machinery, Ltd.
Docket Number BER-L-6857-03
Motion to Dismiss for Lack of Personal Jurisdiction
Decided: November 3, 2006
Miller, J.S.C.

STATEMENT OF FACTS & MOVANT'S ASSERTIONS

In his Complaint, plaintiff alleges that on October 11, 2001 he was injured while working on a shear machine in the course of his employment with Curcio Scrap Metal, Inc in Saddle Brook, NJ. Plaintiff alleges that the subject machine was manufactured by J. McIntyre Machinery, Ltd. ("McIntyre"). Plaintiff also named

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McIntyre Machinery America, Ltd., Inc. ("MMA") of Stow, Ohio as a defendant in the action.

McIntyre, a U.K. company based in Nottingham, England, does not have the constitutionally required minimum contacts with N.J. to permit the Court's exercise of personal jurisdiction over it. The absence of minimum contact was confirmed during the jurisdictional discovery phase of this case, which was conducted following the Appellate Division's reversal of this Court's dismissal order and remand for such discovery.

McIntyre now renews its motion to dismiss for lack of personal jurisdiction. A New Jersey Court's exercise of personal jurisdiction over McIntyre would force McIntyre to defend a civil suit in a jurisdiction where it has never sold, advertised or distributed any product, resulting in a patent unfairness to McIntyre. McIntyre has no offices, property, or employees in New Jersey. It has never done business or paid taxes here. As is set forth below, well-established principles of due process prohibit McIntyre from being forced to defend this action in New Jersey. Because plaintiffs have failed to meet their burden of establishing that McIntyre is subject to personal jurisdiction in a New Jersey Court even after extensive jurisdictional discovery was conducted the Court should again grant McIntyre's motion to dismiss for lack of personal jurisdiction.

J. McIntyre manufactures and ships shearing machines. *See*, Certification of Sally Johnson,

paragraphs 2-5. In 1995, J. McIntyre manufactured the machine at issue in this case and shipped it to a purchaser in Stow, Ohio. *Id.* at 7, McIntyre does not directly market, sell or solicit the business of anyone in New Jersey to buy its products, nor does it maintain an office in New Jersey. *Id.* at 14, and 16. McIntyre has no employees in New Jersey nor does it have any agents here. *Id.* at 17. McIntyre is not licensed to do business in New Jersey, and does not have a registered agent in New Jersey. *Id.* at 20-21. Although it maintains a website, McIntyre does not solicit sales or provide a means to purchase products through its website, and McIntyre has not knowingly received or responded to any requests for information about its products through its website or electronic mail from any business or individual located in New Jersey. *Id.* at 23.

The purchaser, McIntyre Machinery America, Ltd. (MMA) is an Ohio corporation with its principal place of business in Stow, Ohio. *Id.* MMA is not now nor has it ever been affiliated with J. McIntyre. *Id.* MMA is a separate entity with no common owners or managers with J. McIntyre. McIntyre cannot be certain that it manufactured the machine in question because it recently learned that MMA may have copied the designs of certain McIntyre products and sold them in the U.S.A. without McIntyre's knowledge. *Id.* at 7. McIntyre had no knowledge of the business dealing between MMA and its customers including Curcio Scrap Metal, Inc. *Id.* at 10. McIntyre did not ship or otherwise transfer the subject machine from Ohio to New Jersey, nor was McIntyre in any way involved or knowledgeable of such transaction. *Id.* at 11.

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Plaintiffs bear the burden of establishing personal jurisdiction. *Reliance Nat'l Ins. Co. In Liquidation v. Dana Transp., Inc.*, 376 N.J. Super. 537, 546 (App. Div. 2005); *A.V. Imports, Inc. v. Col De Fratta S.A.*, 171 F. Supp. 2d. 369, 371 (D.N.J. 2001). As the Appellate Division explained, once the defendant has "shown that [it] has no territorial presence in this state," the burden shifts to the plaintiff, "who must then demonstrate [the defendant's] amenability, nonetheless, to an exercise of *in personam* jurisdiction based on minimum contacts." *Citibank, N.A. v. Estate of Simpson*, 290 N.J. Super. 519, 533 (App. Div. 1996). Plaintiffs have failed to sustain their burden.

New Jersey's long-arm rule provides for the assertion of personal jurisdiction consistent with due process of law. Rule 4:4-4(b)(1). This court may exercise personal jurisdiction over J. McIntyre if both requirements of a two-prong test prescribed by the due process clause are satisfied. *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322 (1989). First, the court must determine that the defendant has sufficient minimum contacts with the forum state. *Id.* Second, the court must find that it would comport with traditional notions of fair play and substantial justice to assert jurisdiction over the defendant. *Id.*

The plaintiff must establish either specific jurisdiction, that the particular cause of action arose from the defendant's activities in the forum state, or general jurisdiction, that the defendant has continuous and systematic contacts with the forum state. *Waste*

Management, Inc. v. Admiral Ins. Co., 138 N.J. 106, 119 (1994). In this case, general jurisdiction does not exist over McIntyre because there is no evidence of any "continuous and systematic" contacts with New Jersey. Plaintiffs have not disputed this fact.

Specific jurisdiction exists when the particular cause of action sued upon arose from the defendant's activities in the forum State. *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119 (1994). In the context of specific jurisdiction, the "minimum contacts inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" *Lebel*, 115 N.J. at 323 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

First, the court must examine whether minimum contacts with New Jersey exist. "The relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). It is essential, therefore, that the defendant purposefully availed itself of conducting activities with the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958). A fundamental purpose of the minimum contacts test is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp., supra.* at 291-92. The requirement that the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" affords a "degree of predictability" so that potential

defendants may know where they are amenable to a lawsuit and structure their conduct accordingly. *Id.* at 297.

Plaintiffs cannot meet this burden. McIntyre never purposefully availed itself of the privilege of doing business in New Jersey. It did not sell the machine at issue to a customer in New Jersey. In fact, it has never sold or shipped any machine to a customer in New Jersey. It has no presence in this State. McIntyre is a British company which, during all relevant times, sold and shipped shears and other equipment to MMA in Ohio. Subsequently, as it appears from a copy of an invoice obtained by plaintiffs, MMA resold and shipped a shear machine to Curcio Scrap Metal, Inc., Mr. Nicastro's employer in New Jersey. McIntyre had no control over the process or means by which the at-issue machine came into New Jersey, nor did it have any knowledge of that transaction.

As the Supreme Court has made clear, when contacts with the forum state are merely "'random,' 'fortuitous,' or 'attenuated,'" there can be no purposeful availment. *Burger King Corp.*, 471 U.S. at 475. Even if plaintiff did suffer injury while using a machine manufactured by McIntyre, that is simply not enough to establish the necessary element of purposeful availment. *World-Wide Volkswagen Corp.*, *supra*, at 298. The relevant constitutional inquiry is whether McIntyre ever engaged in a purposeful activity in New Jersey. Because there are no facts to support such a finding even after plaintiffs conducted extensive jurisdictional

discovery at the direction of the Appellate Division there is no basis for this Court to exercise personal jurisdiction over McIntyre. Accordingly, the Court should grant McIntyre's motion to dismiss this matter.

Although a McIntyre shear machine may have made its way to New Jersey, it cannot be said that McIntyre had anything to do with that result. The most that can be said is that McIntyre sold the subject machine to MMA, an Ohio-based purchaser, and shipped it to MMA in Ohio with no knowledge or reason to know that MMA would later sell and ship the machine into New Jersey. Under prevailing law, McIntyre's act of placing the machine into the "stream of commerce" outside of New Jersey is not enough to satisfy the due process requirements necessary for this Court to exercise personal jurisdiction over McIntyre. In *Asahi Metal Indus. Co. v. Superior Ct. of California*, 480 U.S. 102 (1987), the United States Supreme Court held that merely placing a product into the stream of commerce elsewhere, even with some awareness that the product may ultimately reach the forum state, does not constitute purposeful availment of the forum state and thus cannot be deemed a sufficient minimum contact with the forum state for personal jurisdiction purposes. However, the Justices did not agree on the scope of the stream-of-commerce theory of whether minimum contacts existed on the facts presented.

Four Justices, led by Justice O'Connor, were of the view that ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the

forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully direct toward the forum State." *Id.* Additional conduct of the defendant could include designing a product particularly for the forum state, or marketing through a sales agent in the forum state. *Id.*

Four other Justices, led by Justice Brennan, rejected the "additional conduct" requirement. In their view, "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117. Thus, this plurality found that because Asahi was aware of the distribution system that brought its products into California, there were sufficient minimum contacts. *Id.* at 119-120.

Yet, despite their dispute over the scope of the stream of commerce theory, both pluralities agreed that a finding of minimum contacts requires some purposeful availment by the defendant in the forum state. *See, Renner v. Lanard Toys Ltd.*, 33 F. 3d. 277, 282 (3rd Cir. 1994). *See also*, Movant's Exh. 1, *Masterson v. B.J. Store Inc.*, No. 03-3202, 2005 U.S. Dist. Lexis 18090 (D.N.J. Aug. 17, 2005), lack of personal jurisdiction

pursuant to *Asahi* case. *See also, Leia v. Schmidt Mfg., Inc. v. Sypris Tech. Inc.*, No. 01-5042, 2005 U.S. Lexis 18144 (D.N.J. Aug. 15, 2005), Movant's Exh. 2.

Here, under either view of the stream of commerce theory espoused by the Asahi Court, McIntyre is not subject to the personal jurisdiction of the New Jersey Courts. First, under the Brennan view, McIntyre had no knowledge that one of its products might be sold or delivered to New Jersey. Moreover, the alleged sale of a single McIntyre machine by MMA to Curcio Scrap Metal and the product's shipment from Ohio to New Jersey, all without McIntyre's knowledge or control, was not a regular and anticipated flow of McIntyre's products to New Jersey.

Second, under the O'Connor view, there was no additional conduct by McIntyre that would establish minimum contacts with New Jersey. As plaintiffs' post-appeal jurisdictional discovery confirmed, McIntyre did not design any product for the New Jersey market, McIntyre did not advertise in New Jersey, not did it provide advice to any New Jersey user of its machines. Furthermore, McIntyre has never marketed its products through a New Jersey distributor. Accordingly, the lack of additional conduct by McIntyre in New Jersey and the corresponding lack of minimum contacts compel the conclusion that this Court does not have personal jurisdiction over McIntyre.

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As the Court explained in *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 319-320 (1989):

> "It seems that little profit can be gained from an extended analysis of Supreme Court doctrine until the Court itself draws the lines as the umpire of federalism. In its last effort, the Court split four-four-one on its elucidation of a "stream-of-commerce" theory of jurisdiction. [citing] *Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).* In our last effort, *Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460 (1986)*, we accepted the stream-of-commerce theory as a valid method of discerning the contours of due process. Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate.
>
> We shall attempt to avoid any areas of unsettled jurisprudence. Hence we shall not predicate our result on the "stream-of-commerce" theory of jurisdiction. Rather, we shall stay with the basics."

Id. at 319-322.

Thus, after conduction a basic minimum contacts analysis, the Lebel Court found that a Florida boat

retailer had sufficient minimum contacts and was therefore subject to personal jurisdiction in New Jersey. Those contracts included telephone calls by the retailer to the plaintiff in New Jersey on at least 20 separate occasions, the retailer's mailing of the sales contract to the plaintiff in New Jersey where it was signed, the retailer's receipt of payment from New Jersey, and the retailer's knowledge that the boat was going to be used in New Jersey. In stark contrast, there is no evidence of any such contacts in the instant case.

Finally, in *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106 (1994), the Supreme Court revisited the stream of commerce doctrine. The Court reiterated the *Asahi* plurality's holding, without reservation, as the law of this State: "In Asahi, the defendant was found to have had no minimum contracts to California when it did not purposely avail itself of the California market and had no control over the distribution system that brought its products to California." *Id.* at 126. As the foregoing demonstrates, plaintiffs cannot establish that McIntyre is subject to this Court's jurisdiction under either a "basic" personal jurisdiction analysis or under any prevailing view of the stream of commerce theory. There is simply no evidence that McIntyre ever engaged in a purposeful activity in New Jersey. Moreover, McIntyre had no knowledge that one of its products would end up in New Jersey, nor did it have control over the distribution system by which it came here. The fact that the subject shear machine found its way to New Jersey, without more, is not sufficient to satisfy the minimum contacts requirement of the Due Process Clause. Accordingly, this Court should not exercise personal jurisdiction over McIntyre.

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OPPOSITION

Plaintiffs argue that the Court did have specific personal jurisdiction over defendant J. McIntyre, due to its "minimum contacts" with New Jersey and its purposeful availment of the United States market including New Jersey, evidenced by its shipment of goods there, its holding of US patents, its repeated participation in national trade shows inside of the United States, and its vicarious liability by use of its exclusive American agent and distributor, McIntyre Machinery America, Ltd. Evidence exists that J. McIntyre actively seeks buyers in the state of New Jersey, through their exclusive U.S. dealer, and via their website. Their exclusive U.S. agent identified at least four scrap metal companies in New Jersey have J. McIntyre Machinery. *See*, Non-Movant's Exh. V, and W. Thus, not only does J. McIntyre have minimum contacts with the state of New Jersey due to their tortious conduct within the state, but they purposefully avail themselves of the North American market, including New Jersey.

On a motion to dismiss for lack of personal jurisdiction, a court must accept as true the uncontroverted allegations of the party seeking to assert jurisdiction and resolve in its favor all conflicts between the facts contained in the parties' affidavits and other documents. Rule 4:6-2. Thus, where no discovery has been conducted and no evidentiary hearing held, the plaintiff only has to make a prima facie showing that jurisdiction is proper.

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New Jersey has a long-arm rule that permits its courts to exercise personal jurisdiction over nonresident defendants within the borders of due process of law. Rule 4:4-4(b)(1). Due process requires the defendant to have minimum contacts with New Jersey such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts inquiry examines the defendant's purposeful activity within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The minimum contacts requirement may be satisfied under the stream of commerce theory. "If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those states. The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum state." *World-Wide, supra*, at 297-298. The New Jersey Supreme Court adopted the stream of commerce theory in *Charles Gendler & Co. v. Telecom Equipment Corp*, 102 N.J. 460, 472 (1986). In *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989), the New Jersey Supreme Court noted that this theory may have become unsettled after the decision rendered in *Asahi, supra*.

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In *Cruz v. Robinson Engineering*, 253 N.J. Super 66 (App. Div.) *certif denied*, 160 N.J. 9 (1992), the court concluded that the stream of commerce theory was not rejected but merely disfavored only if personal jurisdiction could be established under the traditional minimum contacts analysis. The Court in *Cruz* went on to state that "as a matter of its own policy, New Jersey has a considerable interest in providing a forum to those of its citizens who are employed here and sustain industrial accidents here." *Id.* at 74.

J. McIntyre actively seeks to sell its products throughout the United States, including New Jersey. In *LG Electronics Inc. v. First International Computer, Inc.*, 138 F. Supp. 2d. 574 (D.N.J. 2001), the Court found that a Korean electronics firm had purposefully availed itself of doing business in the forum state when it had a US distributor in California to distribute and market its product throughout the United States. *Id.* at 588. This is an identical situation.

J. McIntyre continues to ship goods to the US, holds US patents, has repeatedly participated in national trade shows inside of the United States, and uses an exclusive American agent and distributor, McIntyre Machinery America, Ltd., to distribute products throughout the US. As demonstrated by the contents of its website, and the e-mails from its current US sales agent, J. McIntyre actively pursues sale of its products throughout the United States. It cannot be surprised that it is being brought into court in New Jersey.

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Moreover, the defendant's internet activities also create minimum contacts with New Jersey. Courts have developed a sliding scale standard for determining whether to exercise personal jurisdiction over a non-resident defendant based on a defendant's internet activity. *See*, *Machulsky v. Hall*, 210 F. Supp. 2d. 531, 538-540 (D.N.J. 2002). Under this sliding scale, internet sites are categorized in three ways, according to interactivity levels: "(1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and, (3) passive sites allowing access to information but not enabling the exchange of information with a host computer." *Machulsky*, *supra*. Here, defendant no only advertised items for sale over the internet through its website, but its website had interactive content whereby a potential customer could contact the company, and the company would then have the distributor contact the customer. *See*, Non-Movant's Exh. F, Ross Certification.

The second step of the *Lebel* Court's two-step inquiry used to determine whether due process has been satisfied is whether, under the due process component of the Fifth Amendment, the maintenance of the suit offends traditional notions of fair play and substantial justice. In this case, involving catastrophic personal injuries to a New Jersey working man, and the deliberate entry and marketing of the product by the defendant throughout the United States, fair play and substantial justice are not offended, and the public policy and law of New Jersey requires the imposition of jurisdiction over the defendant.

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REPLY

The recurrent theme in plaintiff's opposition is that McIntyre purposefully availed itself of the privileges of conducting business in the United States for example, by selling its products to companies in Ohio, Pennsylvania and Texas, by attending trade shows in Nevada and Florida, and by holding United States patents so therefore McIntyre should be subject to a New Jersey court's exercise of personal jurisdiction because New Jersey is one of the fifty United States. This argument fails when cast in the light of well settled precedent of both the United States and New Jersey Supreme Court, which require that a defendant have sufficient minimum contacts with a particular state not the United States generally.

"'[I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and production of its laws.'" *Waste Management Inc. v. Admiral Ins. Co.*, 138 NJ. 106, 119 (1994). Plaintiffs fail to present any evidence in their opposition that meets the "purposeful availment" standard. Because McIntyre did not and does not have sufficient minimum contacts with the State of New Jersey, this Court should not exercise personal jurisdiction over McIntyre.

Plaintiffs are unable to point to any credible evidence of contacts with New Jersey. There is no evidence that McIntyre solicited customers in New

Jersey. It is irrelevant whether MMA was covered by McIntyre's liability insurance policies. It is also irrelevant that McIntyre has defended lawsuits in West Virginia, Massachusetts, and Illinois. This does not mean that McIntyre has sufficient minimum contacts with New Jersey to support personal jurisdiction. In addition, plaintiff's reliance on *Cruz v. Robinson Engineering*, 253 N.J. Super. 66 (App. Div. 1992) is misplaced. Unlike the defendant in *Cruz*, McIntyre did not custom design and build equipment for the New Jersey marketplace, *not* did McIntyre have any knowledge that a product it sold to an Ohio company would ultimately end up in New Jersey.

Having failed to establish traditional minimum contacts or purposeful availment, plaintiffs then turn to McIntyre's website in the hope of establishing jurisdiction on that ground. However, plaintiffs have mischaracterized McIntyre's website, which is a passive, non-interactive site that is not directed to customers in New Jersey, or any other state. Accordingly, they cannot rely upon it to establish jurisdiction.

In their opposition, plaintiffs offer an irrelevant *forum non conveniens* "interests" analysis in an effort to persuade the Court that since the plaintiff, the plaintiff's employer and certain evidence are in New Jersey, this case should proceed here. Thus the only relevant fairness inquiry here is that of the fairness to the defendant, McIntyre, having to defend a suit in a state in which it has never done business and with which it has not contacts sufficient to confer jurisdiction over

it. *See, World Wide Volkswagen, supra,* at 291-292. Plaintiffs must first establish the Court's jurisdiction over McIntyre, which they are unable to do.

COURT'S REASONING AND FINDING(S)

On March 5, 2004, this Court heard oral arguments, after submission of briefs by the parties, and issued an opinion and order, dismissing the plaintiff's complaint. *See*, Movant's Exh. C, D, and E. The plaintiff appealed; and, on May 26, 2005, the Appellate Division reversed and remanded pursuant to its opinion.

On June 22, 2005, the Court entered a case management order, which provided a jurisdictional discovery period to end on January 19, 2006. The jurisdictional period was extended by the Court to March 20, 2006. The defendant J. McIntyre Machinery LTD. ("JMM") again moved for an Order to dismiss the complaint for lack of personal jurisdiction over defendant JMM. The plaintiff again opposes the motion.

New Jersey's only limitation upon the exercise of its long arm jurisdiction over a non-resident defendant is that it be "consistent with due process of law." *R.* 4:4-4(b)(1), provides that, "Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it [New Jersey] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *See, Lebel v. Everglade Marina Inc.*, 115 N.J.

317, 322 (1989), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In order to determine whether personal jurisdiction can be exercised over the defendant, the court must determine whether there are sufficient minimum contacts such that the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts portion of the analysis, if there is no general jurisdiction as in this case, requires the defendant to have purposefully availed itself of the protection of the laws of New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey. The second part of the analysis examines the foreseeability of being brought to court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the stream of commerce with the expectation that the product would be purchased by consumers in New Jersey. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *See also*, prior opinion and order dated March 5, 2004, Exhibits C, D, and E of Movant's brief. This Court can only exercise personal jurisdiction over defendant JMM if (1) JMM has certain minimum contacts "with New Jersey such that they could 'reasonably anticipate being haled into Court [here];'" *See, World Wide Volkswagen Corp. v. Woodson.* 444 U.S. 286, 297, 62 L. Ed. 2d. 490, 100 S. Ct. 559 (1980); and, (2) "the assertion of personal jurisdiction would comport

with 'fair play and substantial justice.' *See, Burger King Corp., Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d. 528, 105 S. Ct. 2174 (1985). The burden to establish personal jurisdiction rests upon the plaintiffs Nicastro. *See, Carteret Sav. Bank, F.A. v. Shushan*, 95 F. 2d. 141,146 (3rd Cir. 1992); *Wartsila NSD North America v. Hill Intern. Inc.*, 269 F. Supp. 2d. 547 (D.N.J. 2003), *Citibank v. Simpson*, 290 N.J. Super. at 533.

First, the court must analyze the defendant's contacts with New Jersey. The record does not reflect any activity taken on the part of the defendant in the state of New Jersey. The defendant has no contacts with the state of New Jersey. Defendant JMM does not directly market, sell, nor solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. *See*, Sally Johnson Certification, para. 14-22. The defendant JMM does not maintain a sales staff in New Jersey, did not provide maintenance or repair services for it products to businesses or individuals in N.J. *Id.* The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The defendant does not have a single contact with New Jersey short of the machine in question ending up in this state. The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but fails to produce any evidence as to that fact. Indeed, the evidence is that MMA is not a subsidiary of JMM. *See*, Sally Johnson Certification, para. 8. As a result, the plaintiff has failed to make a prima facie showing that the defendant has sufficient minimum contacts with New Jersey to subject it to

personal jurisdiction in this state. *See*, *World-Wide*, *supra; Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant if that system purposefully brought the defendant's shear machines to New Jersey. *Asahi*, *supra*, at 112. The fact that the defendant may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Notwithstanding the extensive, additional jurisdictional discovery period, *supra*, the Court still finds that "there is insufficient evidence to sustain jurisdiction by hewing to the fundamentals as to which there [remains] little or no dispute." *See*, Appellate Division opinion, *supra*, at page 4, Movant's Exh. F, and opinion of this Court, dated March 5, 2004, Movant's Exh. D, as well as papers submitted in opposition to this motion. Here, the plaintiff can not meet its burden to establish personal jurisdiction. Indeed, even when purported contacts are "random, fortuitous, or attenuated," there can be no purposeful availment. *See, Burger King Corp.*, 471 U.S. at 475, and *World Wide Volkswagen*, *supra*, at 298.

Assuming *arguendo* minimum contacts, the plaintiff has not established that the defendant could foresee itself being haled into court in New Jersey even utilizing

a stream of commerce theory. This theory is currently unsettled in both federal and state law. *See, Asahi, supra; World-Wide, supra; Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66 (App. Div. 1992); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989). However, even utilizing the most liberally accepted form of the stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey. "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide, supra*, at 297-298. There is no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey. Plaintiff cites *LG Electronics, Inc. v. First International Computer*, 138 F. Supp. 2d. 574, 588 (D.N.J. 2001), which is readily distinguishable from the matter at bar. There, in *LG* the parties did not dispute that there was personal jurisdiction over FICA in the Northern District of California. The Court in *LG* continued its analysis in accord with the following factors: (1) that the defendant purposefully directs its activities at the residents of the forum (California), (2) the claim arises out of or relates to those activities, and (3) jurisdiction is Constitutionally reasonable and fair. *See, Genetic Implant Sys. Inc. v. Core-Vent Corp.*, 123 F. 3d. 1455, 1458 (Fed. Cir. 1997). Finally, FIC and FICA were manufacturer and subsidiary, which is a critical distinction from the matter at bar.

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The assertions regarding the website, See, Exhibits F and G, of plaintiff's papers, are unavailing. The website is passive and not interactive; and clearly not a purposeful availment to do business in this state. This is not a minimum contact, only conjecture. *See*, Certification of Sally Johnson, para 23, and Exh. C of plaintiff's opposition papers. Pursuant to Paragraph 23, of said Johnson Certification, it provides as follows: "Although it maintains an internet website, J. McIntyre (JMM) does not solicit sales or provide a means for residents of New Jersey or any other state in the United States to purchase J. McIntyre (JMM) products through its website. To date, J. McIntyre (JMM) has not knowingly received or responded to any request for information about its products through its website or electronic mail from any business or individual located in New Jersey, with the exception of an electronic message sent by plaintiff's counsel in this matter before the complaint was served." This Certification is unrebutted by the plaintiff. *See, Ragonese v. Rosenfeld*, 318 N.J. Super. 63, 68-69 (Law Div. 1998), citing *Blumenthal v. Drudge*, 992 F. Supp. 44, 54-57 (1998) explaining the differences between active and passive internet sites, and the resulting legal consequences based on the type of website. Here, the Court finds that the website was a passive site allowing access to information but not enabling the exchange of information with the host computer, nor contacts with the host computer, nor conducting business directed to New Jersey. Simply put, this website lacks the requisite interactivity and commercial nature of exchange of information.

See, Machulsky v. Hall, 210 F. Supp. 2d. 531, 538-539 (D.N.J. 2002). *See,* Plaintiff's Exh. G. When a defendant, such as JMM, merely posts information or advertisements on a website, as here with JMM, personal jurisdiction over a defendant, such as JMM, can not be upheld. *See, Machulsky, supra,* at 540, "Absent a showing that defendant purposefully directed his published statements toward the seller as either a business woman, or attorney in New Jersey, or toward the State itself," the posting of information of advertisement on a website, does not afford personal jurisdiction over such a defendant; *See, Machulsky, supra,* at 538-540.

In *LG* the Court found that FIC purposefully directed its activities at California. Thereby, the Court held that the stream of commerce theory was applicable because FIC has minimum contacts with California sufficient to satisfy this prong. Here, the plaintiffs have utterly failed to establish such minimum contacts as well as purposeful availment, or that the defendant J. McIntyre Machinery LTD. ("JMM") purposefully directed its activities at New Jersey. It must be remembered that MMA, based in Ohio, was neither a subsidiary, nor affiliated with JMM. Neither was JMA a corporate parent of MMA. MMA is an entirely separate business entity; and, JMM has never had, not shared either common owners, managers, or employees with MMA. *See,* Certification of Sally Johnson. In contrast to *LG,* this Court finds that plaintiff has not met the minimum contacts test. *See, World Wide Volkswagen Corp., supra,* at 291-292. As noted in *World Wide*

Volkswagen, *supra*, at 292: ". . . [T]he relationship between the defendant and the forum [here New Jersey, *not* United States] must be such that it is 'reasonable . . . to require the corporation [here defendant JMM] to defend the particular suit which is brought [here].'" *See also*, *Waste Management Inc. v. Admiral Ins, Co.*, 138 N.J. 106, 119 (1994). The "minimum contacts inquiry must focus on the relationship among the defendant, the forum, and the litigation." *See*, *Lebel*, *supra*, at 323 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

The plaintiff seeks to rely upon *Cruz*, *supra* in opposing this motion. However, Cruz is easily distinguishable from the case at bar. In particular, the plaintiff relies upon the language in *Cruz* that states that additional relevant factors of the case balance in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the aforementioned minimum contacts and purposeful availment analysis. In addition, *Leber*, *supra* is more reliable in that it was decided by the Supreme Court of New Jersey. It should also be noted that the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. *See*, *Asahi*, *supra*. The so called stream of commerce theory is clearly unsupportable in the context of the facts at bar. *See*, *Asahi*, *supra*, involved a product liability case the grew out of a motorcycle accident in California. The allegations were that the motorcycle tire, tube and sealant were defective. *Id.* at 105-106. The plaintiff sued the Taiwanese manufacturer of the tube, which in turn filed

a cross complaint for indemnification against *Asahi Metal Industry*, who had manufactured the tube's valve assembly. *Id.* at 107. Comparable to the facts in this case, *Asahi*, too, had no offices, property, nor presence in California (the forum state). *Asahi* neither solicited business, not made direct sales on the state, nor did it design nor control the system of distribution that brought its product into the forum states. *Id.* at 108. *Asahi* challenged personal jurisdiction in California.

While the decision was a plurality decision, the principles of *Asahi* obtain here. Justice O'Connor held that California courts could not exercise personal jurisdiction over *Asahi* because to do so would not comport with notions of fair play and substantial justice as due process requires. For four justices, Justice O'Connor wrote that: ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state." *Id.* at 112. Succinctly, Justice O'Connor held that ". . . [T]he placement of a produce into the stream of commerce, without more, is not an act of the defendant purposefully directed to the forum state." *Id.* Under Justice O'Connor's plurality, the plaintiff must demonstrate "additional conduct . . . that may indicate an intent or purpose to serve the market in the forum state." *Asahi, supra*, at 112.

Justice Brennan wrote for four (4) other justices, he expressly rejected "additional conduct" requirement.

Justice Brennan wrote, with respect to "additional conduct," that: "The stream of commerce refers not to unpredictable currents or eddies, *but to the regular and anticipated* flow of products from manufacture to distribution to retail to sale. As long as a participant in this process is aware that the final product is being *marketed* in the forum state, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Emphasis added).

Suffice that both pluralities held that the scope of stream of commerce theory require a finding of minimum contacts which is inclusive of purposeful availment by the defendant in the forum state. *See*, *Asahi*, *supra*, and *Renner v. Lanard Toys LTD.*, 33 F. 3d. 277, 282 (3rd Cir. 1994). Here, under either view of the stream of commerce theory expressed by the plurality of *Asahi*, *supra*, the defendant JMM cannot be subject to personal jurisdiction in New Jersey. In addition, the fact that the plaintiff was injured in New Jersey does little to create personal jurisdiction over the defendant, with the requisite minimum contacts and purposeful availment of this forum (New Jersey).

As a result of the foregoing, the motion to dismiss for lack of personal is granted.

s/ Elijah L. Miller, Jr.
Hon. Judge Elijah L. Miller, Jr., J.S.C.

APPENDIX G EXCERPTED TRANSCRIPT OF MOTION TO DISMISS DATED NOVEMBER 3, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-6857-03
APP. DIV. NO.

ROBERT NICASTRO, ROSEANN NICASTRO,

Plaintiffs,

vs.

MC INTYRE MACHINERY AMERICA, Ltd, et al,

Defendants.

Place: Bergen County Courthouse
10 Main Street
Hackensack, New Jersey
Date: November 3, 2006

BEFORE:

HONORABLE ELIJAH L. MILLER, JR. J.S.C.

[commencing at p. 62] * * *

THE COURT: All right. Suffice at this point, I'm going to rule in regard to put to bed, in regard to the *Gendler*. That's Charles Gendler, G-e-n-d-l-e-r & Company Telecom question.

Appendix G

Lebel v. Everglades Marina, Inc., 115 N.J. [63] 317, 319 to 320 said:

> "It seems that little profit can be gained from an extended analysis of a Supreme Court doctrine till the Court itself draws the lines as to the umpire of federalism. In its last effort, the Court split four to one in its elucidation of the stream of commerce theory of jurisdiction citing *Asahi*, 480 U.S. at 117."
>
> "In our last effort in *Charles Gendler & Company at Telecom Equipment*, 102 N.J. 460 (1986), we accept the stream of commerce theory as a valid method concerning the contours of due process.
>
> "Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall now hue closely to the limited fundamentals by which there is little or no dispute or debate. We shall attempt to avoid errors of unsettled jurisprudence; hence, we will predicate our results from the stream of commerce theory justification rather than stay along the basics at this point in time."

And they went through a basis analysis in [64] *Lebel.* At this point, they clearly were aware of its prior decision, and they defined what that prior decision would be under the context of *Lebel.*

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Lebel is at 115 N.J. 317 (1989), three years after that case.

In March 5th, 2004, this Court heard oral arguments after submission of briefs by the parties and issued an opinion and order dismissing the plaintiff's complaint. See Movant's Exhibit C, D, and E.

The plaintiff appealed, and on May 26, 2005, the Appellate Division reversed and remanded pursuant to its opinion.

On June 22nd, 2005, this Court entered a case management order, which provided a jurisdictional discovery period to end January 19, 2006. The jurisdictional period was extended by this Court to March 20, 2006.

Defendant J. McIntyre Machine, Ltd., henceforth, JMM, again moves for an order to dismiss the complaint for lack of personal jurisdiction over defendant J over defendants JMM.

The plaintiff again opposes the motion.

New Jersey's own limitation upon exercise of its long arm jurisdiction over a non-resident defendant is that it be consistent with due process law, pursuant [65] to Rule 4:4-4(b)1, provides that, quote:

> "Due process requires only that an order to subject a defendant to a judgment of in

> personam if he be not present within the territory of the forum," this is New Jersey "he" in this case, it, that is JMM "have certain minimal contacts with it," that is New Jersey "such that the maintenance of it so it does not offend traditional notions of fair play and substantial justice."

See *Lebel v. Everglades Marina Inc.*, 115 N.J. 317 at Page 322 (1989), quoting *International Shoe Company v. Washington* at 326 U.S. 310 at Page 316 (1945).

> "In order to determine whether personal jurisdiction can be exercised over the defendant, the Court must determine whether there are sufficient minimal contacts, minimum contacts, such that the suit does not offend traditional motions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310 at Page 316 (1945)

> "The minimum contacts portion of the [66] analysis, if there is no general jurisdiction, as in this case, requires the defendant to have purposely availed itself of the protection of the laws in New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey.

Appendix G

> "The second part of the analysis examines the foreseeability of being brought to the Court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the stream of commerce with the expectation that the product would be purchased by consumers in New Jersey." See *Worldwide Volkswagen's Corp. v. Woodson*, 444 U.S. 286 (1980). See also prior opinion of this Court and the order of this Court dated March 5th, 2004. See Exhibits C, D, and E of the movant's brief.

The Court can only exercise personal jurisdiction over defendant JMM if:

One, JMM has certain minimal contacts with [67] New Jersey, such that they would "reasonably anticipate being hailed into the court here." See *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 at Page 297, 62 Lawyer's Edition 2nd 490 and 100 Supreme Court 558 (1980).

And, two, "The assertion of personal jurisdiction would comport with fair play and substantial justice." See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at Pages 476, 85 Lawyers 2nd Edition 528, 105 Supreme Court 2174 (1985).

The burden to establish personal jurisdiction rests upon the plaintiff, Nicastro. See also *Carteret SA v. Bank*

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FA v. Shushan, 95 F.2d 141 at Page 146 (3rd Cir. 1992). See *Wartsila NSD North American v. Hill Intern Inc.*, Fed Supp 2d. 547, (DNJ 2003). See also *Citibank v. Simpson*, 290 N.J. Super. at Page 553.

First, the Court must analyze the defendant's contacts with New Jersey.

The record does not reflect any activity taken on the part of the defendant in the State of New Jersey. The defendant has no contacts with the State of New Jersey. Defendant JMM does not directly market itself and sell nor solicit business of anyone in New Jersey to buy its products, nor did it ever do so. See [68] Sally Johnson's certification, Paragraphs 14 to 22. The defendant JMM does not maintain sales staff in New Jersey, did not provide maintenance nor repair services for its products to businesses and/or individuals in New Jersey. See *Id.* once again, Sally Johnson's certification.

The defendant does not have an office in New Jersey. Does not advertise or solicit sales in New Jersey.

The Court is aware that your the website purportedly, but I find that to be passive and not to be organ to be targeted in New Jersey.

Defendant does not have a single contact with New Jersey, short of machining machining question ending up in this state.

Appendix G

The plaintiff alleges that McIntyre Machine American, Ltd, MMA, is an Ohio subsidiary of the defendant, but fails to produce any evidence as to that fact. Indeed, the evidence that MMA is not a subsidiary of JMM. See Sally Johnson's certification, Paragraph 8.

As a result, the plaintiff has failed to make a prima facie showing that defendant has sufficient minimal contacts with New Jersey to subject to personal jurisdiction in this state. See *Worldwide*, [69] *Supra*. See *Asahi Metal Industry Company Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant, if that system purposely brought the defendant's shears machines to New Jersey. See *Asahi* at 112.

The fact that defendant may have sufficient minimum contacts with the United States to establish jurisdiction in this country does not reason to is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Notwithstanding the extensive additional jurisdictional period, *Supra*, the Court still finds that "there is insufficient evidence to sustain jurisdiction by adhering to the fundamentals as to which there remains little or no dispute." See the Appellate Division's opinion, *Supra.*, at Page 4; Movant's Exhibits F; and opinion of this Court dated March 5th, 2004, movant's

Exhibits D, as well as a paper submitted in opposition to this motion here.

The plaintiff cannot meet its burden to establish personal jurisdiction; indeed, even when purported even with purported contacts are random, [70] fortuitous, or attenuated, there can be no purposeful availment. See *Burger King, Supra* at 471 U.S. at 475 and *Worldwide Volkswagen, Supra.* at 298.

Assuming arguendo minimal contacts, the plaintiff has not established that the defendant could foresee itself being hailed into the Courts of New Jersey, even utilizing the stream of commerce theory.

This theory currently is unsettled in both federal and state law. See *Asahi, Supra.* and *Worldwide, Supra.* See *Cruz v. Robinson Engineering Corp.* at 253 NJ Super 66 (App. Div. 1992), and *Lebel v. Everglades Marina*, 115 N.J. at 317 (1989).

However, even utilizing the most liberal accepted form of stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey.

> "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce, with expectation that they will be purchased by customers in the forum state." *Worldwide* at 297, Page 298.

There is no evidence here establishing that [71] the defendant had any expectation that his product would be purchased and utilized in New Jersey.

Compare *LGE Electronics Inc v. First International Computer*, 138 F.Supp 2d 574 at Page 588 to 589 (DNJ 2001), which is readily distinguishable from the matter at bar.

There, in *LGE*, the party did not dispute that there was personal jurisdiction over FICA in the Northern District of California. Indeed, the Court, reading, was severed and sent back to Northern California in regard to FIC and FICA.

The Court in *LGA* (sic) continued its analysis in accordance with the following factors:

One, that the defendant purposely directed its activities at the residence of that forum, California.

Two, the claim arises out of or relates to those activities; and,

Three, the jurisdiction is constitutionally reasonable and fair. See *Genetics Implant Sys, Inc. v. Core-Vent*, 123 Fed. 3d 1455 at Page 1458 (Fed. Cir 1997).

Finally, FIC and FICA in *LGE* were manufacturer and subsidiary; clearly unlike the matter at bar.

Appendix G

[72] There's an assertion of a website see Exhibits F and G of the plaintiff's papers are unavailing. The website is passive and not interactive. Clearly not a purposeful availment to do business in this state. This is not a minimal contact, only conjecture. See certification of Sally Johnson, Paragraph 23 and Exhibit G of the plaintiff's opposition papers. See also *Machulky (sic) v. Hall* at 210 F.Supp 2d at 540.

Malchuky, Supra. at 540:

> "Absent a showing the defendant purposely directed its published statements toward the seller as either a businesswoman or attorney in New Jersey toward New Jersey residents or toward the State itself, the posting of information advertisement on a website does not afford personal jurisdiction over such a defendant." See *Malchuky, Supra.* at Pages 538-540.

The plaintiff seeks to rely on *Cruz, Supra* in opposing this motion. However, *Cruz* is easily distinguishable from the case at bar. Particularly, the plaintiff relies on the language in *Cruz* I'm sorry. I'm sorry.

Continuing.

[73] In *LG*, the Court found that FIC purposely directed its activities at California; thereby, the Court held that the stream of commerce theory was applicable

cause FIC was a had minimal contacts with California sufficient to satisfy this prong.

Here, plaintiff Nicastro have utterly failed to establish such minimum contact, as well as purposefully availment, or that the defendant purposely directed his activities to New Jersey.

It must be remembered that McIntyre Machinery of America, MMA, based in Ohio, was neither a subsidiary nor affiliated with JMM, nor corporate parent of MMA.

MMA is an entirely separate business entity, and JMM was never has never had nor shared either common owners, managers, or employees with MMA. See certification of Sally Johnson.

In contract, LE *LGE* case and this Court finds that there was a servant-and-master situation; that it is in that context, manufacturer and subsidiary.

This Court finds that the plaintiff has not met the minimum contacts. See *Worldwide Volkswagen Corp. Supra* at Pages 291 to 292.

As noted in *Worldwide Volkswagen*, *Supra* at [74] 292, quote:

> "The relationship between the defendant and the forum, here New Jersey, not the United States, must be such that it is reasonable to

> require the corporation" here the defendant JMM "to defend the particular suit which brought it there."

See also *Waste Manufacturers, Inc. v. Admiral Insurance Company* at 138 N.J. 106 at Page 119 (1994):

> "The minimum contact required must focus on 'the relationship among the defendant, the forum, and the litigation.'"

See *Lebel, Supra*, at Page 323, quoting *Shaffer v. Heitner* at 433 U.S. 186 at Page 204 (1977).

Continuing to read what I read abortedly initially:

The plaintiff seeks to rely on *Cruz Supra* in opposing this motion; however, *Cruz* is easily distinguishable from the case at bar. In particular, the plaintiff relies on the language in *Cruz* that states the additional relevant factors of this case based in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the [75] aforementioned minimum contacts and purposeful availment analysis. In addition, *Lebel, Supra* is more reliable, in that it was decided by the Supreme Court of New Jersey.

It should be also noted the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. See *Asahi, Supra.*

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The so-called stream of commerce theory is clearly unsupportable in the context of the facts at bar. See *Asahi, Supra.*

Involved a product liability case that grew out of a motorcycle accident in California. The allegations were that the motorcycle tire tube and sealant were defective. *Id.* at Page 105 to 106.

The plaintiff sued a Taiwanese manufacturer of the tube, which in turn filed a cross complaint for its indemnification against Asahi Industry, who had manufactured the tubes valve assembly. *Id.*, once again, at Page 107.

Comparable to the facts in this case *Asahi*, too, had no offices, property, no presence in the forum state of California, the forum. Asahi neither solicited business, nor made any direct sales in the state. Nor did it design or control the system of [76] distribution that brought its products into the forum state. *Id.* at 108.

Asahi challenged the personal jurisdiction in California.

While the decision was a plurality decision, the principles of *Asahi* obtain (sic) here. Justice O'Connor held that California Courts could not exercise personal jurisdiction over Asahi because "to do so would not comport with the notion of fair play and substantial justice as due process requires."

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Four Justices, in an opinion written by Justice O'Connor, wrote that:

> "Defendant's awareness that the stream of commerce may or will sweep a product into the forum state does not convert the mere act of placing the product into the stream into an act purposely directed toward the forum state." *Id.* at Page 112.

Succinctly, Justice O'Connor held that:

> "The placement of a product in the stream of commerce without more is not an act of the defendant purposely directing to the forum state."

Under Justice O'Connor's plurality, that Four Justices the plaintiff must demonstrate [77] additional conduct that indicate an intent or purpose to serve the market in the forum state. See *Asahi, Supra.* at Page 112.

Justice Brennan wrote for the four other justices. He expressly rejected, "the additional conduct" requirement. Justice Brennan wrote with respect to "additional conduct," that:

> "The stream of commerce refers not to the unpredictable currents or eddies, but to the regular and anticipated flow of products from the manufacturer to the distribution to retail

> sale. As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117. (Emphasis added).

Suffice that both pluralities held that the scope of stream of commerce theory requires a finding of minimal contacts, which is inclusive of the purpose inclusive of purposeful availment by the defendant in the forum state. See *Asahi, Supra* and see *Renner v. Lanard Toys, Ltd.* at 33 F.3rd 277 at Page 282 (3rd Cir. 1994).

Here, either view of the pluralities of [78] *Asahi, Supra.* of the stream of commerce theory, the defendant JMM cannot be subject to personal jurisdiction of New Jersey. Therefore, the fact the defendant was injured in New Jersey does little to create personal jurisdiction over the defendant. As a result, the foregoing motion to dismiss for lack of personal jurisdiction is granted for these reasons stated.

Thank you for listening to be labor through the opinion and answering the tough questions here. It is an intriguing issue here, gentlemen. I appreciate your scholarly work and your arguments that you've presented in this matter.

I'll mark up the order and will submit a copy of the opinion, so you can proceed as you see fit.

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Thank you all. Have a good weekend.

MR. GOOBY: Thank you, Your Honor.

MR. ROSS: Thank you, Judge.

(Proceedings concluded at 11:28 a.m.)

APPENDIX H OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED MAY 26, 2005

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3981-03T1

ROBERT NICASTRO and ROSEANN NICASTRO,

Plaintiffs-Appellants,

v.

McINTYRE MACHINERY AMERICA, LTD., and J. McINTYRE MACHINERY LTD.,

Defendants-Respondents.

Argued May 10, 2005 – Decided May 26, 2005

Before Judges Coburn, Wecker and Graves.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6857-03.

PER CURIAM

Plaintiffs, Robert and Roseann Nicastro, appeal from a summary judgment dismissing their complaint on the ground that defendant J. McIntyre Machinery Ltd. ("JMM"), was not subject to personal jurisdiction in New Jersey. We reverse and remand for discovery on the jurisdictional issue.

Appendix II

JMM is a British corporation located in Nottingham, England. It manufactures metal shearing machines. In 1994 or 1995, the owner of Curcio Scrap Metal ("Curcio"), a company located in New Jersey, attended a national conference in Las Vegas where he learned about JMM's shearing machine at an exhibition booth. The materials available indicated that the machine was distributed throughout the United States by defendant McIntyre Machinery America, Ltd. ("MMA"), an Ohio corporation with its principal place of business in Stow, Ohio. JMM denied having any legal relationship with MMA other than using it as its sole distributor in the United States until it went bankrupt in 2001, at which point JMM designated a Texas company as its sole distributor in the United States.

In 1995, Curcio ordered one of JMM's metal shearing machines, called a McIntyre Model 640 Shear, 440 volt, from MMA at a cost of $24,900. The machine was sent from JMM in England to MMA and then to Curcio, who received it in 1995. On October 11, 2001, Robert Nicastro, one of Curcio's employees, was severely injured while using the machine in the normal course of his duties. For present purposes we must assume that the injuries, which included amputation of several fingers, were due to defects in the machine that rendered it unsafe under our products liability law.

Although the record does not show whether JMM was the exhibitor in Las Vegas in 1994 or 1995, at a 2002 exhibition in Orlando, Florida, run by the same organization, JMM was listed as an exhibitor. Material

inappropriately submitted by the Nicastros in their reply brief indicates that JMM's new national distributor may have sold four JMM machines in New Jersey.

Although the form of service at the time of the motion was inadequate, as the judge properly found, JMM has since been adequately served under the Hague Convention. *In re Hayes Lemmerz Int'l, Inc.*, 271 *F. Supp.* 2d 1007 (E.D. Mich. 2003).

Plaintiffs contend that their evidence supports New Jersey jurisdiction under the stream-of-commerce doctrine endorsed by our Supreme Court in *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 *N.J.* 460, 472 (1986). Alternatively, they argue that the trial court erred in denying them jurisdictional discovery.

In *Lebel v. Everglades Marina, Inc.*, 115 *N.J.* 317 (1989), which was decided after the United States Supreme Court's decision in *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 *U.S.* 102, 107 *S. Ct.* 1026, 94 *L. Ed.* 2d 92 (1987), the Court said that "little profit can be gained from an extended analysis of Supreme Court doctrine [on the stream-of-commerce] until the Court itself draws the lines as the umpire of federalism." *Lebel, supra*, 115 *N.J.* at 319. Our Supreme Court then noted that notwithstanding its decision in *Gendler*, and "[r]ather than embark[ing] on a prediction of the future course of this stream of jurisprudence," it would "hew closely to the limited fundamentals about which there is little or no dispute or debate." *Lebel, supra*, at 320.

Appendix H

In the instant case, there is insufficient evidence to sustain jurisdiction by hewing to the fundamentals as to which there is little or no dispute. However, further discovery may well show sufficient contacts without resorting to the stream-of-commerce doctrine. Moreover, such discovery may also demonstrate with greater clarity than is in the record before us that jurisdiction is warranted under the stream-of-commerce doctrine, either as espoused by our Supreme Court in *Gendler* or perhaps as espoused by Justice O'Conner in her plurality opinion in *Asahi*. Such discovery is clearly justified under our case law. *See, e.g., Citibank v. Estate of Simpson*, 290 *N.J. Super.* 519, 531 (App. Div. 1996).

Therefore, we reverse and remand for further proceedings which shall include complete jurisdictional discovery.

APPENDIX I ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY GRANTING J. McINTYRE MACHINERY LTD.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION DATED AND FILED MARCH 5, 2004

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO: BER-L-6857-03

ROBERT NICASTRO and ROSEANN NICASTRO, husband and wife,

Plaintiffs,

v.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

Civil Action

ORDER GRANTING J. McINTYRE MACHINERY LTD.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

THIS MATTER was opened to the Court upon the application of Bressler, Amery & Ross, P.C., attorneys for J. McIntyre Machinery Ltd. for the entrance of an

Appendix I

Order granting its motion to dismiss it from this action for this Court's lack of personal jurisdiction over it and, in the alternative, for the entrance of an order quashing plaintiffs' service of process upon it. The Court has reviewed the moving and opposing papers and for good cause shown

IT IS on this 5th day of March, 2004

ORDERED that defendant J. McIntyre Machinery Ltd.'s motion to dismiss it from this civil action for this Court's lack of personal jurisdiction over it be and hereby is granted; and

IT IS FURTHER ORDERED that a true copy of this Order shall be served upon all counsel of record within seven (7) days from the entrance hereof.

s/ Elijah L. Miller, Jr.
Elijah L. Miller, Jr., J.S.C.

APPENDIX J MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f) DATED MARCH 5, 2004

MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(F)

TO: Mark McMenamy, Esq.
P.O. Box 1980
Morristown, NJ 07962

Alexander Ross, Esq.
76 East Main Street
Marlton, NJ 08053-2142

RE: Nicastro v. McIntyre Machinery America, Ltd., *et al.*
Docket Number BER-L-6857-03
Motion to Dismiss for Lack of Personal Jurisdiction
March 5, 2004

STATEMENT OF FACTS

While at work at Curcio Scrap Metal in Saddle Brook, New Jersey, the plaintiff was injured by a shear manufactured and shipped to the United States by J. McIntyre Machinery, Ltd.

MOVANT'S ASSERTIONS

The defendant J. McIntyre Machinery, Ltd. (J. McIntyre) is a corporation organized under the laws of the United Kingdom with its principal place of business being in Nottingham, England. J. McIntyre manufactures and ships shearing machines. In 1995,

J. McIntyre manufactured the machine at issue in this case and shipped it to a purchaser in Stow, Ohio. The purchaser, McIntyre Machinery America, Ltd. (MMA) is an Ohio corporation with its principal place of business in Stow, Ohio. MMA is not now nor has it ever been affiliated with J. McIntyre. MMA is a separate entity with no common owners or managers with J. McIntyre. As a result, J. McIntyre does not have any knowledge of the transactions made by MMA and other entities.

New Jersey's long-arm rule provides for the assertion of personal jurisdiction consistent with due process of law. Rule 4:4-4(b)(1). This court may exercise personal jurisdiction over J. McIntyre if both requirements of a two-prong test prescribed by the due process clause are satisfied. *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322 (1989). First, the court must determine that the defendant has sufficient minimum contacts with the forum state. Second, the court must find that it would comport with traditional notions of fair play and substantial justice to assert jurisdiction over the defendant. When a defendant contests personal jurisdiction the plaintiff bears the burden of establishing the defendant's contacts with the forum state are sufficient to permit the court to exercise personal jurisdiction over it. *A.V. Imports, Inc. v. Col de Fratta S.P.A.*, 171 F. Supp. 2d 369, 371 (D.N.J. 2001). The plaintiff must establish either specific jurisdiction, that the particular cause of action arose from the defendant's activities in the forum state, or general jurisdiction, that the defendant has continuous and systematic contacts with the forum state. *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119 (1994).

First, the court must examine whether minimum contacts with New Jersey exist. "The relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). It is essential, therefore, that the defendant purposefully availed itself of conducting activities with the forum state. *Hanson v. Denckla,* 357 U.S. 235 (1958). The plaintiff cannot meet this burden because J. McIntyre never purposefully availed itself of the privilege of doing business in New Jersey. J. McIntyre has never sold or shipped any machine to a customer in New Jersey. Also, it has no presence in this state. Since J. McIntyre did not engage in any purposeful activity in New Jersey, the court should grant its motion to dismiss for lack of personal jurisdiction.

J. McIntyre has no contacts with New Jersey. Although the shearing machine at issue wound up in New Jersey, J. McIntyre sold the machine to an Ohio based purchaser and had no knowledge that the machine would one day be shipped into New Jersey. J. McIntyre's act of placing the machine into the stream of commerce elsewhere is not enough to satisfy the due process requirements necessary for this court to exercise personal jurisdiction over it. In *Asahi Metal Indus. Co. v. Superior Ct. of California,* 480 U.S. 102 (1987), the United States Supreme Court held that merely placing a product into the stream of commerce elsewhere, even with some awareness that the product may ultimately reach the forum state, does not constitute purposeful

availment of the forum state and thus cannot be deemed a sufficient minimum contact with the forum state for personal jurisdiction purposes. The circumstances presented in *Asahi* are analogous to those in this case. J. McIntyre is an overseas company that never entered New Jersey to sell any product. It has no offices, agents, employees, or property in New Jersey. J. McIntyre has never advertised in New Jersey nor solicited the business of anyone to buy its product in this state. Nor did J. McIntyre engage in any additional conduct beyond placing the machine into the stream of commerce elsewhere that is sufficient to establish minimum contacts.

It is also important to note that the plaintiffs failed to effect service of process as required by international law and the rules of the court. Service of process is deeply rooted in basic constitutional protections. Due process requires that defendants be given notice and an opportunity to defend. In addition, an international treaty applies here. "The Hague Convention provides a mechanism by which a plaintiff authorized to serve process under the laws of its own country can effect service that will give appropriate notice to the party being served and will not be objectionable to the country in which the party is served." *Gapanovich v. Komori Corp.*, 255 N.J. Super. 607, 611 (App. Div. 1992). On this basis alone, the court should quash service of process and ensure that proper service, by way of the Hague Convention, is made upon J. McIntyre so that the plaintiffs can obtain a valid judgment. The plaintiffs purported to serve J. McIntyre by sending a copy of

the summons and complaint to Bobby Alexander, an employee of a Texas company that purchases J. McIntyre machines, of Fort Worth, Texas. J. McIntyre learned of this lawsuit when Mr. Alexander's lawyer faxed J. McIntyre a copy of the papers purportedly served on Mr. Alexander. Mr. Alexander is not a director, officer, trustee, or employee of J. McIntyre nor is he authorized to accept service of process on behalf of J. McIntyre. As a result, this court must order the plaintiff's purported service of process squashed so that proper service can be obtained.

OPPOSITION

On a motion to dismiss for lack of personal jurisdiction, a court must accept as true the uncontroverted allegations of the party seeking to assert jurisdiction and resolve in its favor all conflicts between the facts contained in the parties' affidavits and other documents. Rule 4:6-2. Thus, where no discovery has been conducted and no evidentiary hearing held, the plaintiff only has to make a prima facie showing that jurisdiction is proper.

New Jersey has a long-arm rule that permits its courts to exercise personal jurisdiction over nonresident defendants within the borders of due process of law. Rule 4:4-4(b)(1). Due process requires the defendant to have minimum contacts with New Jersey such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts inquiry examines the defendant's purposeful activity within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The minimum contacts requirement may be satisfied under the stream of commerce theory. "If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those states. The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum state." *World-Wide* at 297-298. The New Jersey Supreme Court adopted the stream of commerce theory in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 472 (1986). In *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989), the New Jersey Supreme Court noted that this theory may have become unsettled after the decision rendered in *Asahi*, supra. In *Cruz v. Robinson Engineering*, 253 N.J. Super 66 (App. Div.) *certif. denied*, 160 N.J. 9 (1992), the court concluded that the stream of commerce theory was not rejected but merely disfavored only if personal jurisdiction could be established under the traditional minimum contacts analysis.

The interests in New Jersey in adjudicating this personal injury action involving a resident working in a New Jersey factory greatly outweigh any burden to

J. McIntyre. The machine, plaintiff and plaintiff's employer are all here in New Jersey. In fact, there is no better forum than New Jersey for adjudicating this matter. For these reasons, the plaintiff requests that the defendant's motion to dismiss for lack of personal jurisdiction be denied.

As to service of process, the plaintiff is currently in the process of serving J. McIntyre via the Hague Convention. If personal service has not been completed by the time this motion is considered, it soon will be. The plaintiff, therefore, requests that its complaint not be dismissed on the basis of failure to comply with the Hague Convention.

REPLY

The personal jurisdiction argument that is before the court is an interesting legal issue as it relates to the stream of commerce theory of jurisdiction. Nonetheless, this legal question is easy to resolve on the factual record before the court. In *Asahi*, supra, the United States Supreme Court agreed that California could not exercise personal jurisdiction over Asahi, a Japanese manufacturer that had made a component of the tube valve assembly that had been incorporated into the motorcycle that the plaintiff had been riding. Since Asahi had no offices, property or agents in California, solicited no business from and made no direct sales to California, and did not control the system of distribution that resulted in its products being brought to California, it did not have sufficient contacts with California to support the exercise of personal jurisdiction.

Appendix J

Since *Asahi*, the United States courts have been inconsistent in their application of the decision. The stream of commerce cases cited by the plaintiff are readily distinguishable from the facts at hand and do not support the exercise of personal jurisdiction over J. McIntyre. In *Dave's Trash Removal v. Charm City*, 214 N.J. Super. 497 (App. Div. 1987), the court concluded that the defendant, a Maryland corporation, could be sued in New Jersey because it contracted to sell a garbage truck to a New Jersey resident. In addition, there were extensive and direct dealings between the Maryland defendant and the New Jersey plaintiff. The direct contacts between the defendant and New Jersey in that case have not been replicated by J. McIntyre in the matter at hand. In *Cruz v. Robinson Engineering*, 253 N.J. Super. 66 (App. Div. 1992), the Appellate Division noted that the viability of the stream of commerce theory of jurisdiction had been left unsettled since *Asahi*. The court stated that jurisdiction over a foreign defendant "depends on whether the subject of the litigation arises out of . . . specific jurisdiction, or . . . general jurisdiction." *Asahi* at 72.

The defendant submits that the controlling law with respect to the facts and circumstances surrounding the J. McIntyre shear at issue are most analogous to those in *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3rd Cir. 1985). All that is before the court is evidence of one isolated fortuitous sale of a J. McIntyre shear into New Jersey that was arranged and concluded by others without McIntyre's knowledge or involvement. *World-Wide Volkswagen* states that such isolated sales, which

were caused by others, are not sufficient to support the exercise of personal jurisdiction over a foreign manufacturer. *World-Wide Volkswagen* at 297-298. For these reasons, the motion to dismiss should be granted.

Plaintiff's counsel has acknowledged that service of process has not been legally made and is currently in the process of attempting to serve J. McIntyre in accordance with the requirements of the Hague Convention. Thus, at the very least, the motion to quash the service of process should be granted.

SURREPLY

The cases relied upon by the defendant concern foreign manufacturers of component parts who sell that part to another foreign company who, in turn sells a product made with that component to the United States. In the present case, J. McIntyre designed and manufactured the entire machine and shipped it to MMA in Ohio. J. McIntyre continues to ship its completed products to the United States for distribution throughout the entire country. In addition, it holds United States patents on its machines, attends industry conferences in this country, and incorporates United States standards into its instruction manual. Since J. McIntyre actively pursues sales of its products throughout the United States, it cannot be surprised that it is being brought into court in New Jersey. The court must consider whether the maintenance of this suit in New Jersey offends traditional notions of fair play and substantial justice. *In re Automotive Refinishing*

Paint Antitrust Litigation, 2004 WL 258661 (3rd Cir. February 13, 2004). In this case, certainly such notions have not been offended. In order to prevail on this motion, the plaintiff need only make a prima facie showing that personal jurisdiction exists. The facts presented in this matter have accomplished this.

In regard to the motion to quash service, service as per the Hague Convention takes up to sixteen weeks to be completed. Currently, the plaintiff has begun this process. To quash service under these circumstances merely delays the inevitable.

COURT'S REASONING AND FINDING

In order to determine whether personal jurisdiction can be exercised over the defendant, the court must determine whether there are sufficient minimum contacts such that the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The minimum contacts portion of the analysis, if there is no general jurisdiction as in this case, requires the defendant to have purposefully availed itself of the protection of the laws of New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey. The second part of the analysis examines the foreseeability of being brought to court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the

stream of commerce with the expectation that the product would be purchased by consumers in New Jersey. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

First, the court must analyze the defendant's contacts with New Jersey. The record does not reflect any activity taken on the part of the defendant in the state of New Jersey. The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but does not produce any evidence as to that fact. As a result, the plaintiff has failed to make a prima facie showing that the defendant has sufficient minimum contacts with New Jersey to subject it to personal jurisdiction in this state. See *World-Wide*, supra; *Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant if that system purposefully brought the defendant's shear machines to New Jersey. *Asahi* at 112. However, since this is not a federal suit, the fact that the defendant may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Assuming arguendo minimum contacts, the plaintiff has not established that the defendant could foresee

itself being haled into court in New Jersey even utilizing a stream of commerce theory. This theory is currently unsettled in both federal and state law. See *Asahi*, supra; *World-Wide*, supra; *Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66 (App. Div. 1992); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989). However, even utilizing the most liberal accepted form of the stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey. "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide*, at 297-298. There is no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey.

The plaintiff seeks to rely upon *Cruz*, supra in opposing this motion. However, *Cruz* is easily distinguishable from the case at bar. In particular, the plaintiff relies upon the language in *Cruz* that states that additional relevant factors of the case balance in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the aforementioned minimum contacts and purposeful availment analysis. In addition, *Lebel*, supra is more reliable in that it was decided by the Supreme Court of New Jersey. It should also be noted that the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. *Asahi*, supra. Therefore, the fact

that the plaintiff was injured in New Jersey does little to create personal jurisdiction over the defendant.

As a result of the foregoing, the motion to dismiss for lack of personal is granted. In addition, service of process is quashed.

s/ Elijah L. Miller, Jr.
Hon. Judge Elijah L. Miller, Jr., J.S.C.

Court, U.S.
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No. 09-1343

IN THE
Supreme Court of the United States

J. McINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign manufacturer that places a defective product in the stream-of-commerce through a distribution scheme that targets a national market, including New Jersey, may be subject to *in personam* jurisdiction of a New Jersey court in a products liability action when its product causes injury in that State.

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PRELIMINARY STATEMENT

Before it sought review in this Court, Petitioner, J. McIntyre Machinery, Ltd. (hereinafter "J. McIntyre"), filed liquidation proceedings the equivalent of bankruptcy in the United Kingdom. Although there is no automatic stay of litigation in Great Britain when a company enters liquidation, J. McIntyre has insufficient funds to satisfy any potential judgment. J. McIntyre has sold off all of its assets and is no longer a viable company. Therefore, this litigation may become moot. Moreover, Petitioner's insurer, Hampden Insurance NV, is also insolvent and is in a run-off. *See* letter from Petitioner's counsel, attached as Appendix A hereto. Therefore, due to the bankruptcy of the Petitioner, and the insolvency of its insurer, this case is a poor vehicle to explore the question presented.

In its brief, Petitioner advances two flawed arguments on the merits. First, it argues that the New Jersey Supreme Court has made a "sweeping departure from this Court's due process jurisprudence" with its decision. Second, it argues that the New Jersey Supreme Court has created a "new stream-of-commerce theory," described by the Petitioner as "an unqualified and unexplained notion: the single 'global marketplace.'" Petitioner's Brief at pages 2 and 7.

Contrary to these arguments, the New Jersey Supreme Court has simply re-affirmed the existing stream-of-commerce theory as set forth in the New Jersey case of *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986), and the United States Supreme Court case of *Asahi*

Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion of Justice O'Connor). Under the facts of this case, there is personal jurisdiction over the Petitioner under any existing theory of stream-of-commerce jurisdiction. Therefore, this case does not implicate any division of authority, because jurisdiction would be proper under any existing approach; the question presented is purely academic.

Apart from the soundness of the decision below and the absence of any conflict on an important issue of law, certiorari is not warranted because the case is in an interlocutory posture. The New Jersey Supreme Court held that the trial court erred in dismissing the Complaint and remanded the case for proceedings on the merits. Should J. McIntyre prevail on the merits, the question it now seeks to present will become academic. Should Respondents prevail on the merits, J. McIntyre will be able to present those issues to this Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment in a State Court action before granting review, and there is no reason to depart from that sound procedure in this case.

INTRODUCTION

Petitioner's arguments have no merit. Both the New Jersey Supreme Court and the United States Supreme Court have embraced the stream-of-commerce theory in one form or another for the last thirty (30) years. In *Robert Nicastro, et al. v. McIntyre Machinery America, Ltd., et al.*, 201 N.J. 48 (2010), the New Jersey Supreme Court simply found that the factual record easily supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine, as articulated in *Charles Gendler* and *Asahi*, due to the deliberate creation by a foreign manufacturer of a nationwide distribution strategy, by use of an exclusive American distributor, for selling its products to citizens throughout all states, including New Jersey.

The New Jersey Supreme Court noted that J. McIntyre, a company incorporated in the United Kingdom, "targeted the United States market for the sale of its recycling products." *Nicastro*, 201 N.J. at 78. It did so by forming McIntyre Machinery America, Ltd. (hereinafter "MMA"), an Ohio-based company, to be its exclusive United States agent and distributor for approximately seven (7) years, ending in 2001 with MMA's bankruptcy and dissolution. J. McIntyre knew or reasonably should have known that the distribution system it created and directed extended to the *entire* United States. For years, J. McIntyre employees and officers, together with MMA employees and officers, attended scrap metal trade shows and national conventions in various large American cities, where its products were advertised and offered for sale to citizens of all states. In fact, J. McIntyre and MMA used the

same booth at the Las Vegas trade convention where plaintiff's employer first saw the McIntyre Model 640 Shear, which, due to its defective design, eventually severed four (4) of plaintiff's fingers. *Nicastro*, 201 N.J. at 55. As concluded by the New Jersey Supreme Court, J. McIntyre:

> knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States.

Nicastro, 201 N.J. at 78-79.

J. McIntyre purposefully availed itself of the entire American market, including New Jersey, by the creation, control and direction of an exclusive American distributor, and by appearing with regularity at national trade shows and conventions, for the purpose of marketing its products throughout the entire United States.

Additionally, since J. McIntyre employees and officers had no difficulty traveling throughout the United States to attend these trade shows and sell its products, they cannot be heard to complain that it would be a violation of traditional notions of fair play and substantial justice for it to be subject to the jurisdiction

of New Jersey courts. *Nicastro*, 201 N.J. at 76. To allow a different result would be to provide a road map to all foreign corporations to shield themselves from liability by hiring an exclusive American distributor, and requiring any plaintiffs injured by its products in the United States to travel to that American distributor's state in order to maintain an action against it, no matter what hardship is created by such a draconian rule.

Contrary to the arguments of the Petitioner in its brief, in *Nicastro*, the New Jersey Supreme Court simply re-affirmed its prior decision in *Charles Gendler*, *supra*, and meticulously articulated how its decision was in strict conformity with the prevailing law throughout the United States regarding foreign manufacturers, including the decision of the United States Supreme Court in *Asahi*, *supra*. The New Jersey Supreme Court carefully integrated the existing stream-of-commerce "plus" doctrine into the reality of today's current global marketplace, and did not create a "new test" or standard for *in personam* jurisdiction.

Rather, the New Jersey Supreme Court specifically held that its decision was indistinguishable from Justice O'Connor's stream-of-commerce plus theory in *Asahi*, also espoused in *Charles Gendler*, to the effect that:

> a manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution scheme that might lead to those products being sold in any of the 50 states must expect that it will be

> subject to this state's jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury.

Nicastro, 201 N.J. at 76-77.

The New Jersey Supreme Court noted: "The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold." *Nicastro*, 201 N.J. at 77.

In other words, by placing its product into the stream the commerce, **plus** creating and managing a nationwide distribution scheme intending for its products to be distributed throughout the United States, **plus** attending national trade shows where consumers from all over the country can see their goods, **plus** providing post-sale service to customers in the United States, **plus** advertising in national trade magazines, the foreign manufacturer has triggered personal jurisdiction in any state in which its product causes injury.

STATEMENT OF FACTS

In April 2009, Petitioner filed for liquidation (the equivalent of bankruptcy) in Great Britain. Although the Respondents have filed a Proof of Claim, the chances of a full recovery are slim, due to the allegation by Petitioner's counsel that Petitioner's insurance carrier, who has directed this litigation for nearly seven years and continues to direct it, is also in a "run-off" or

liquidation, and perhaps insolvent. *See* Letter from Petitioner's Counsel, attached hereto as Appendix A. Although there is no equivalent of an "automatic stay" of litigation following the filing of liquidation proceedings in Great Britain, this case may be financially moot, and therefore a poor vehicle for certiorari on the issue of personal jurisdiction.

On October 11, 2001, plaintiff, Robert Nicastro, a resident of New Jersey, suffered catastrophic injuries while working on a metal shearing machine known as an "alligator shear", designed and manufactured by J. McIntyre to cut scrap metal into smaller pieces, at his employer's business location in Saddle Brook, New Jersey. Mr. Nicastro's injuries include amputations and attempted re-attachment of all four fingers on the right hand of this working man. Mr. Nicastro had multiple surgeries to repair his mangled hand, and has been on and off disability since the date of the accident. His employer's New Jersey-based worker's compensation insurance has paid nearly one-half million dollars in medical and other benefits.

Plaintiff's liability expert, Dr. Wayne Nolte, P.E., thoroughly inspected the shearing machine in question. Dr. Nolte opined that the shearing machine was a dangerous and defective product, which did not comply with ANSI industry and OSHA standards applicable in New Jersey or elsewhere in the United States for such equipment.

J. McIntyre filed a motion to dismiss the Complaint against it, contending that the Superior Court of New Jersey did not have personal jurisdiction over it. Mr.

Nicastro argued that the Court *did* have specific personal jurisdiction over J. McIntyre, due to its "minimum contacts" with New Jersey by virtue of its purposeful availment of the United States market, including New Jersey, evidenced by its shipment of goods there, its holding of US patents, its repeated participation in national trade shows throughout the United States, and its marketing strategy of using an exclusive American agent and distributor, MMA (which was bankrupt and dissolved prior to Mr. Nicasto's injury), to ship its products throughout the United States, including New Jersey.

Defendant J. McIntyre was based in Nottingham, England. The president of Mr. Nicastro's employer, Frank Curcio, ordered the J. McIntyre-built machine after seeing it at a trade show he attended in Las Vegas, Nevada. J. McIntyre designed and custom built the machine in England, and shipped the completed three-ton machine to its exclusive American distributor and admitted agent, MMA (formerly of Ohio, and now dissolved through bankruptcy). MMA, in turn, shipped the machine to plaintiff's employer, Curcio Scrap Metal, in Saddle Brook, New Jersey.

This is not a case of merely one component part being sold outside of the United States, and then used in a larger product manufactured outside of the United States, which then randomly found its way into the United States and eventually New Jersey, unknown to its manufacturer, as was the case in *Asahi*, *supra*. Nor is this a case of a used machine, manufactured overseas, that was sold on the secondary market in the United States, or purchased at auction, unknown to its

manufacturer. This large machine, weighing in excess of three (3) tons, did not arrive in New Jersey by accident, but by deliberate marketing and sales design of J. McIntyre, including personal attendance by senior management at national trade shows intended to attract customers from throughout the USA, including New Jersey.

Jurisdictional discovery in this case revealed that J. McIntyre directed MMA's marketing plan, shared booths with MMA at national trade shows in various American cities, sent its employees to America to repair its machines, and even included MMA on J. McIntyre's liability insurance. Discovery also revealed that Michael Pownall, President of J. McIntyre, attended both the 1994 and 1995 trade shows in Las Vegas, which is where Nicastro's employer saw the machine he purchased.

Mr. Curcio, Nicastro's employer, certified that if the machine needed a replacement part, he would have contacted the manufacturer in England. Indeed, J. McIntyre's pre-liquidation website stated that "we supply equipment worldwide from our base in Nottingham, England," and encouraged customers to call England for spare parts and service.

The documentation which accompanied the machine was printed in England, but references USA standards, in addition to UK standards. Therefore, it is obvious that J. McIntyre was directing sales and intending to sell its products specifically to United States customers. Interestingly, it appears as though J. McIntyre not only structured MMA's advertising and sales efforts in the United States, but also covered MMA under its liability

insurance policy until at least January 1, 2000. It appears that a J. McIntyre employee named David was in America to do on-site repairs to machines for United States customers. Discovery has also revealed that J. McIntyre considered MMA "partners" or at the very least its "agent" in the United States. A fax dated November 23, 1999, from Michael Pownall of J. McIntyre to MMA stated: "All we wish to do is sell our products in the United States – and get paid! If this isn't possible then the only other option open to us is for us to split up in an amicable fashion as quickly as we can." Another faxed letter, dated January 13, 1999, from Sally Johnson of J. McIntyre to Mary Gaither of MMA, states: "I have spoken to the Boss regarding your last email, and we both agree that it is time he and I came over to visit you to see how we can get things back on an even keel and move the business forwards [sic]." Another letter from Sally Johnson to Mary Gaither of MMA, also dated January 13, 1999, states: "sales in the States will start to come in, as they have from the rest of the world, and that McIntyre Machinery America can take over the after-sales support, commissioning, service, etc. . . ." In other words, J. McIntyre was an active partner in MMA, controlling sales, service and support.

Additionally, two articles which appeared in a trade publication called *Recycling Today*, one in May 2002 and one on October 10, 2003, discuss J. McIntyre's sales efforts being directed towards the United States market. The article in May 2002 contains statements from Sally Johnson, J. McIntyre's managing director, including: "McIntyre shears are well established in America," "Recycling Equipment Corp. (REC), Souderton, Pa., [is] the exclusive North American

distributor of its complete line of metal cleaning shears," and "we sold a shear straight off the stand at an American exhibition." May 2002, *Recycling Today* Article. Clearly, when its exclusive distributor was in Souderton, Pennsylvania, less than an hour from the New Jersey border, defendant J. McIntyre should have and would have expected that its product may be purchased and utilized in nearby New Jersey.

Plaintiffs also hired an investigator to find other scrap metal dealers in New Jersey who own a machine manufactured by J. McIntyre. According to Bob Alexander of Strip-Tec, J. McIntyre's 2003 exclusive dealer in the United States, at least **four** scrap metal companies in New Jersey have J. McIntyre machines: Raff Recycling in Cape May Court House, Max Weinstein Scrap Metals in Union, Cinelli Scrap Metal in Hackensack, and Curcio Scrap Metal in Saddlebrook (Nicastro's employer). Thus, J. McIntyre actively sought buyers in the state of New Jersey, through their exclusive U.S. dealer, and via their website. *See also* J. McIntyre's October 10, 2003 article in *Recyling Today*, encouraging "North American buyers" to purchase and register their machines to "allow McIntyre and Strip-Tec to offer full support" for their products. Not only does J. McIntyre have minimum contacts with the state of New Jersey, due to selling their machines through their exclusive distributor to four New Jersey customers, and having an exclusive agent at one time in nearby Souderton, Pennsylvania, but they purposefully availed themselves of the United States market, which includes New Jersey.

In short, J. McIntyre directed its products to be marketed and sold throughout the United States, and yet claims immunity from suit almost anywhere, including New Jersey, due to its strategy of using a thinly-veiled, financially- irresponsible distributor (the bankrupt and dissolved MMA), with a nearly identical name, whose marketing and sales were directed by J. McIntyre, and who was also included in J. McIntyre's liability insurance.

J. McIntyre is a menace to American workers, such as Mr. Nicastro, due to its dangerous and defective product, which it deliberately caused to be marketed and distributed throughout the United States with impunity. J. McIntyre is everywhere when it comes to sales, and nowhere when it comes to liability, due to its disingenuous "independent distributor" strategy, while it not only firmly controlled MMA, it even provided insurance coverage to MMA. This liability-evasion technique is just the sort of activity that stream-of-commerce-plus personal jurisdiction seeks to prevent.

REASONS FOR DENYING THE PETITION

1. THIS CASE IS A POOR VEHICLE TO EXPLORE THE QUESTION PRESENTED BECAUSE THE PETITIONER IS IN LIQUIDATION AND THE CASE MAY BECOME MOOT.

In or about April 2009 the Petitioner, J. McIntyre filed "liquidation" proceedings in Great Britain, which is the equivalent of bankruptcy in the United States. Furthermore, Petitioner's insurer, Hampden Insurance N.V. is also apparently insolvent and is in "run-off."

See letter from Petitioner's counsel dated March 2, 2010, attached as Appendix A. As a consequence, for all practical purposes, this case is or may become moot, due to the absence of any funds to satisfy the Respondent, or to continue with this litigation. Under these circumstances, the case is simply not worthy of Supreme Court review, as it may not constitute an actual, ongoing "case or controversy" as required by the United States Constitution, Article III, Section 2, Clause 1. *Ivy Club v. Edwards*, 943 F. 2d 270, 275 (3d Cir. 1991), *rehearing denied, cert. denied, DelTufo v. Ivy Club*, 503 U.S. 914 (1992).

2. THE INTERLOCUTORY POSTURE OF THIS CASE REQUIRES THAT REVIEW BE DENIED.

In light of Petitioner's bankruptcy and the limitations on this Court's jurisdiction to review non-final state-court judgments, the interlocutory nature of the ruling below also offers a compelling reason to deny review. The New Jersey Supreme Court remanded this case to the Law Division (trial court) for proceedings on the merits. Should J. McIntyre prevail on the merits, the issue of personal jurisdiction will become academic. Should the Respondent prevail on the merits, J. McIntyre will have an opportunity at that time to present the issues of personal jurisdiction to this Court, following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. Of Locomotive Firemen and Enginemen v. Bangor & Aroostook RR*, 389 U.S. 327, 328 (1967), and there is no reason to depart from

3. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

In *Asahi*, Justice O'Connor, writing for four members of the Court, construed the facts of that case under a test that has become known as stream-of-commerce plus. 108-13, 107 S. Ct. at 1030-32 (plurality opinion). Under that test, the actions of a defendant must be "purposefully directed toward the forum State" for a Court of that State to exercise personal jurisdiction. As noted by the *Nicastro* Court, according to Justice O'Connor, the stream-of-commerce plus test requires that the defendant engage in "additional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State." *Ibid.* That "additional conduct" could be "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or **marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.**" *Id.* at 68 (emphasis added). Justice Brennan espoused a less vigorous view of the stream-of-commerce doctrine, and saw no need for plaintiff to present "additional conduct" to establish that the defendant's acts were "purposefully directed toward the forum State." *Id.* at 69.

Even under Justice O'Connor's more restrictive view of "additional conduct" required in her stream-of-commerce plus approach, the New Jersey Supreme Court in *Nicastro* held that J. McIntyre satisfied the stream-of-commerce plus doctrine, by virtue of its

targeting of the national market through a nationwide distribution scheme, inclusive of New Jersey. The New Jersey Appellate Division opinion in *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super 539, 45 A2d 92 (App. Div. 2008), quoted approvingly by the New Jersey Supreme Court, concluded that J. McIntyre's "conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey." *Nicastro*, 201 N.J. at 74.

As set forth in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir.), *cert. denied*, 510 U.S. 914 (1993) and *A. Uberti & Co. v. Leonardo*,181 Ariz. 565, 892 P.2d 1354 (Ariz.) *cert. denied*, 516 U.S. 906 (1995), a manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the 50 states, must expect that it will be subject to any state's jurisdiction if one of its defective products caused injury.

The New Jersey Supreme Court further noted:

> The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. A manufacturer cannot shield itself merely by employing an independent

> distributor a middle man knowing the predictable route the product will take to market.

Nicastro, 201 N.J. at 77 [citations omitted].

The decision of the New Jersey Supreme Court in *Nicastro* merely comports with both long-standing New Jersey Supreme Court and United States Supreme Court opinions on this subject, specifically, *Charles Gendler* and *Asahi*.

In short, the facts of this case would satisfy personal jurisdiction under any prevailing theory and does not implicate any conflict requiring review by this Court.

4. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED BY THE STREAM OF COMMERCE THEORY

In *Nicastro*, the New Jersey Supreme Court held that "a foreign manufacturer that places a defective product in the stream-of-commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to *in personam* jurisdiction of a New Jersey Court in a product liability action." 201 N.J. at 73.

The New Jersey Supreme Court noted that the United States Supreme Court in *Asahi* "embraced the stream-of-commerce theory in one form or another". *Nicastro*, 201 N.J. at 72. It further noted that in *Asahi*,

neither Justice O'Connor nor Justice Brennan "intended that a foreign manufacturer seeking to capture a national market through a nationwide distribution scheme would be immune from suit in every state." To the contrary, by virtue of targeting the entire United States as its potential market, the foreign manufacturer cannot claim immunity when one of its products causes damage or injury in any given state.

As set forth in *Charles Gendler*:

> In today's complex business world foreign manufacturers rarely deliver products directly to consumers in the United States. [Citation omitted.] Instead, these manufacturers employ middle men, many of whom are often independent, to act as their distribution arms. To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit "a legal technicality to subvert justice and economic reality in the worse sense." [Citation omitted.] Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products. [Citations omitted.] Thus, the stream-of-commerce theory supports personal jurisdiction over foreign manufacturers that derived benefits from the distribution and sale of their products in the United States.

* * *

> We believe, however, that a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state. [Citation omitted.] The focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products.
>
> * * *
>
> Accordingly, a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state.

102 N.J. at 479-481.

The "minimum contacts" necessary to satisfy the Due Process Clause of the Fourteenth Amendment is triggered by a nationwide distribution system which targets customers in every state. As stated in *Nicastro*:

> The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer,

> through an independent distributor, knowing that the final destination might be a New Jersey consumer.

201 N.J. at 74-75.

In this case, the British manufacturer of this large industrial product deliberately created a national marketing and distribution scheme throughout the United States, with the intent to sell its products in all fifty states, including New Jersey, with devastating consequences for Mr. Nicastro.

The *Nicastro* court quoted from the United States Supreme Court decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed. 2d 528, 541 (1985), in noting that every state has a strong interest in protecting its citizens:

> A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or work place machinery that causes disabling injuries to employees. A state also has a paramount interest in insuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed. 2d 528, 541 (1985) ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries

> inflicted by out-of-state actors." (citation and internal quotation marks omitted.)) *See also Charles Gendler, supra*, 102 N.J. at 43, 508 A.2d 1127 ("A State's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.")

Nicastro, 201 N.J. at 75.

In *Nicastro*, the New Jersey Supreme Court noted that it was simply re-affirming its holding in *Charles Gendler*, to the extent that "a forum manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey." *Nicastro*, 201 N.J. at 73 and 77. The holding in *Nicastro* is also in strict conformity with Justice O'Connor's plurality opinion in *Asahi*, which listed, among other indicia of minimum contacts, "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," the exact situation here, wherein MMA was the exclusive distributor who agreed to serve as J. McIntyre's US agent for all 50 states, including New Jersey, an "independent agent" which was nonetheless under the frequent and direct control of J. McIntyre. *Nicastro*, 201 N.J. at 76-77.

5. DEFENDING A PRODUCT LIABILITY ACTION IN NEW JERSEY WOULD NOT OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

The New Jersey Supreme Court in *Nicastro* noted in detail that J. McIntyre, "cannot make out a case that travel to New Jersey is onerous or an unfair burden for it to bear."

> J. McIntyre's officials have visited various cities throughout the United States to promote its business interests, attending trade conventions and meeting with representatives of its exclusive distributor. Certainly, defending the product liability action in Ohio, where J. McIntyre's now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada Courts would seem to have an interest in resolving a product-liability action in which an English manufacturer's product injured a New Jersey resident in New Jersey.

Nicastro, 201 N.J. at 79-80.

Furthermore, defending a suit in one of the United States is not as burdensome as it once might have been, given that air transport can bring the principals of a business here within hours and instantaneous

communication allows an ongoing dialogue with counsel in this country.

> If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury.

Nicastro, 201 N.J. at 76.

On the other hand, New Jersey has a strong interest in exercising jurisdiction:

> Plaintiff is a New Jersey resident; the allegedly defective product was purchased by a New Jersey consumer, plaintiff's employer; the injury occurred in a New Jersey workplace; plaintiff was treated for his injuries in the New Jersey regional area; the evidence the shear machine and most of the necessary witnesses, are located in New Jersey; and last, the law of this State likely will govern the action.

Nicastro, 201 N.J. at 80.

As concluded by the New Jersey Supreme Court:

> It would be unreasonable to expect that plaintiff's only forum of relief is to be found

> in the Courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law. Under all the circumstances, New Jersey has a rightful claim to resolve the dispute between the parties and to assert jurisdiction over this product liability action.

Nicastro, 201 N.J. at 80.

In sum, the foreign manufacturer has deliberately visited the United States for marketing purposes at national conventions throughout the country, seeking customers from every state and actively promoting its machines for sale all over the country, and selling it through an exclusive distributor, and should not be heard to complain that it represents an unreasonable or disproportionate burden to litigate a case of catastrophic personal injuries in New Jersey, contrary to "traditional notions of fair play and substantial justice."

The hypothetical example given by Petitioner's counsel regarding a lone candlemaker in Alaska selling a candle through a Seattle gift shop to a New Jersey tourist is utterly inapposite to the case at bar. If the hypothetical candlemaker attended national candle-making trade shows throughout the United States, seeking customers from all 50 states, manufactured candles for industrial purposes, but with dangerous defects such as exploding wax, and hired an "independent" exclusive US distributor, but controlled the distributor's nationwide marketing and sales, provided liability insurance to the distributor, and

boasted of its sales throughout the United States, the candlemaker example would be closer to the reality of this case.

CONCLUSION

For all of the foregoing reasons, the opinion of the New Jersey Supreme Court in *Nicastro* simply reaffirms the existing stream-of-commerce theory, which has been in place for over twenty years in New Jersey under *Charles Gendler*, and set forth in the United States Supreme Court case of *Asahi*, and therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX LETTER TO ALEXANDER W. ROSS, JR. FROM STEVEN F. GOOBY DATED MARCH 2, 2010

ANSA | ASSUNCAO LLP

March 2, 2010

VIA UPS OVERNIGHT DELIVERY

Alexander W. Ross, Jr., Esq.
Rakoski & Ross, P.C.
76 East Main Street
Marlton, New Jersey 08053

Re: *Nicastro v. McIntyre Machinery America, Ltd.*

Dear Mr. Ross:

Enclosed is a copy of correspondence received by my former co-counsel, DLA Piper (UK) LLP, from RSM Tenon Recovery in Nottingham, England concerning J. McIntyre Machinery Ltd.'s ("JMM") liquidation proceedings in the United Kingdom. Included with the Joint Liquidator's correspondence is a copy of a "proof of debt" form. Please be guided accordingly.

We are also advised that JMM's insurer, Hampden Insurance N.V., is insolvent and is in run-off. Enclosed is a copy of the insurer's most recent annual report for your reference. We are further advised that as of December 31, 2009, Hampden closed its London office and its only remaining office is located in Rotterdam.

Please contact me at your convenience to discuss.

Very truly yours,

s/ Steven F. Gooby

Supreme Court
FILED
AUG 16 2010
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No. 09-1343

IN THE

Supreme Court of the United States

J. Mc INTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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PRELIMINARY STATEMENT

J. McIntyre Machinery Ltd. ("J. McIntyre") respectfully submits this Reply in support of its Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Far from simply "reaffirming" this Court's prior rulings, as Respondents contend, the New Jersey Supreme Court in *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), announced a new, unrestrained approach to the stream-of-commerce theory of personal jurisdiction. That new doctrine, requiring nothing more than marketing a product to the United States, and what it portends for both foreign and domestic defendants' constitutional due process rights, renders this an important decision deserving of this Court's review. In an unavailing effort to avoid acknowledging the lower court's fundamental alteration of a defendant's due process rights, Respondents mischaracterize the lower court's ruling as following this Court's precedents, and suggest that there may exist a host of facts to be considered, none of which the lower court deemed necessary to render its decision.

Respondents also oppose the Petition by arguing that this case might possibly be rendered moot at some future time. Respondents have the power to end this case at any time: by dropping the remanded lawsuit in New Jersey state court and by withdrawing their claim in the pending United Kingdom liquidation proceedings. Respondents, after all, are plaintiffs and the key to mootness is in their hands. Respondents, by evidence

of their own opposition to this Petition, are eager claimants; rendering the lawsuit moot appears to be the furthest thing from their minds.

Finally, Respondents assert that this Court lacks jurisdiction, and choose not to discuss, much less distinguish, the case law supplied by Petitioner in support of this Court's ability to hear this matter if it so decides.

ARGUMENTS IN REPLY

I. The Lower Court's New And Extraordinary Expansion Of The "Stream-Of-Commerce" Theory Of Personal Jurisdiction Is Inconsistent With The Limits On That Doctrine That Have Been Articulated By This Court.

In their opposition, Respondents at once seek to deny the novelty and expand the factual basis for the lower court's decision. Respondents state that the decision "merely comports" both with Justice O'Connor's "Stream-of-Commerce-Plus" approach requiring a finding of purposeful conduct ("plus" factors) specifically directed toward the forum, and Justice Brennan's requirement of actual awareness that a product be marketed in the specific forum state, as set forth in their competing plurality opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112-117 (1987); (Opp. Brf., 18). Respondents misapprehend the New Jersey Supreme Court's holding in this case, which that court claimed was a response to a "radically transformed" international economy. (App. 35a). Contrary to Respondents' arguments of conformity with this Court's precedent, the lower court's assertion of radical change is

recognition of the fundamental transformation that it understood it was making in the law of due process and personal jurisdiction.

Respondents also assert a plethora of random facts, which, even if true, were not a part of the New Jersey Supreme Court's reasoning or holding and are thereby irrelevant to this Court's consideration of the Petition.[1] For purposes of its new interpretation of the stream-of-commerce theory, the lower court relied on but two findings: 1) that J. McIntyre marketed to the United States; and 2) that a J. McIntyre machine was purchased by a New Jersey resident. Based on nothing more than those facts and relying on its judicially-noticed discovery of a new "world market," (App. 1a), the court below found jurisdiction over J. McIntyre. Petitioner need not have taken any actions related to New Jersey or even thought about it, a far cry from either plurality in *Asahi*. The lower court's holding explicitly dispensed with a finding of defendant's specific connection with the forum, be it by intentional conduct or through awareness.

This Court, in both *Asahi*, *supra*, and *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), focused on a defendant's minimally-directed activity, contacts

1. On the rare occasion when Respondents address a fact considered by the lower court, they misrepresent what that court found. Contrary to Respondents' contention that J. McIntyre "firmly controlled" the Ohio-based McIntyre Machinery America ("MMA"), (Opp. Brf., 12), the court below found that J. McIntyre and MMA "were distinct corporate entities, independently operated and controlled, without any common ownership." (App. 7a).

with a forum state, or actual awareness of its products in the forum state. Where such activities by the defendant can be established, that defendant can be said to have been given "fair warning" of suit, and requiring it to answer a suit there comports with due process. *See Asahi*, 480 U.S. at 112-17; *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World Wide Volkswagen*, 444 U.S. at 297-98. Where such activities are lacking, however, a "stream of commerce," without more, is not enough to satisfy due process and sustain an exercise of jurisdiction over the defendant. *World Wide Volkswagen*, 444 U.S. at 298-99.

Here, the lower court made no pretense of finding minimally-directed activity toward New Jersey. It completely dispensed with that requirement as an "outmoded construct of personal jurisdiction," (App 35a), and required only that J. McIntyre sold products generally in the United States and that there was a New Jersey resident who purchased the product. None of the alleged facts that Respondents argue square *Asahi* with the lower court's approach were relied upon by the lower court, and form no part of its decision, its holding, or of its extension of jurisdiction over Petitioner.

The lower court's new approach was groundbreaking. It understood that. The dissent understood that. And, on this point, Petitioner agrees. Only Respondents disagree. They are wrong.

II. Respondents Continue To Pursue Petitioner Before The Courts Of New Jersey And In The United Kingdom, Rendering By Their Own Actions This Case As Appropriate For This Court To Hear.

Respondents contend that the question of New Jersey's exercise of personal jurisdiction over Petitioner "may become moot," (Opp. Brf., 12), and because of this possibility, they argue that this case is not a suitable vehicle for this Court to exercise its jurisdiction. This argument fails for several reasons, not the least of which is its utter vagueness.

First, J. McIntyre is not dissolved. The company continues to exist today as an entity that is seeking this Court's review and defending the trial court litigation on remand in the Superior Court of New Jersey. J. McIntyre remains answerable for claims against it.

Second, even as Respondents belittle Petitioner's juridical health for purposes of this Court's review, Respondents express a much different approach to Petitioner when it comes to their own interests. Respondents are actively pursuing their claims in the instant litigation on remand to the New Jersey trial court, and, through British counsel, they have filed their own proof of loss against J. McIntyre with the liquidator in the United Kingdom. Respondents' argument against this Petition requires that this Court ignore Respondents' own conduct, which is directed towards securing a recovery against Petitioner on two fronts, including before this Court.

While Respondents argue on the one hand that the case is an inappropriate vehicle for certiorari because it may—somehow, someday, in some country eventually become moot, they also argue that were J. McIntyre to "prevail on the merits, the issue of personal jurisdiction will become academic." (Opp. Brf. 13). Respondents' argument against review because J. McIntyre may prevail on the merits fundamentally conflicts with their suggestion that the specter of mootness renders this case ultimately futile. Respondents do not suggest that the Petition does not present a case or controversy under the Constitution, and Petitioner urges that this Court take its cue from Respondents' own determination and accept review of the case by granting the instant Petition.

III. The Lower Court's Final Decision To Exercise Personal Jurisdiction Over J. McIntyre Under A New Theory Of Stream-Of-Commerce Is Subject To The Exercise Of This Court's Certiorari Jurisdiction.

The New Jersey Supreme Court's judgment finding personal jurisdiction over J. McIntyre is sufficiently final to warrant this Court's immediate review of the matter pursuant to 28 U.S.C. § 1257(a) and *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 485 (1975). (*See* Pet., 2). Although this case was remanded for further proceedings on the merits, the federal constitutional issue of personal jurisdiction over J. McIntyre was adjudicated to finality and is not subject to further review by the New Jersey courts. This Court has granted review in these very circumstances, finding that a state court judgment involving an important federal

issue is final even though "there are further proceedings in the lower state courts yet to come." *Cox*, 420 U.S. at 485; *see also Shaffer v. Heitner*, 433 U.S. 186, 195 (1977); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973).

In *Cox*, this Court granted immediate review of a state court judgment that upheld the First Amendment constitutionality of a statute authorizing suit against the press for publishing the name of a rape victim. Although the Georgia Supreme Court had remanded the case for trial on the merits, this Court found Section 1257(a)'s finality requirement satisfied because the state court judgment was "plainly final on the federal issue" and "not subject to further review in the state courts." This Court held that while the *Cox* appellants might have prevailed on non-federal grounds, if the state court had erroneously decided the matter "there should be no trial at all" because this Court could find that the statute in question was unconstitutional and thus terminate the litigation. *Cox*, 420 U.S. at 485-86. Accordingly, this Court granted review, noting that a failure to decide the question would leave the press in a state of legal and constitutional uncertainty while the lower court proceedings were pending. *Id.* Here, as in *Cox*, all the predicates for a finding of finality are present, and if the lower court is wrong, Petitioner should face no trial at all.

Shaffer v. Heitner, *supra*, is consistent with *Cox* and procedurally analogous to this case. In *Shaffer*, nonresident defendants were seeking immediate review of a state court's exercise of personal jurisdiction over them, despite their claim that they had no contacts with

the forum state. *Shaffer*, 433 U.S. at 194-95. Employing a pragmatic approach, this Court found that the state court's finding of personal jurisdiction over the defendants was sufficiently final for review. *Id.* This Court reasoned that if review were not granted, the defendants would have the impossible choice of suffering a default judgment or entering a general appearance and defending on the merits. *Id.* Substituting the "Georgia" of *Cox* for the "Delaware" in *Shaffer*, this Court ruled:

> "The (Delaware) Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the (Delaware) court erroneously upheld the statute, there should be no trial at all."

Id. (quoting *Cox*, 420 U.S. at 486).

As in *Cox* and *Shaffer*, the lower court's order finding personal jurisdiction over J. McIntyre is final for purposes of this Court's review. The judgment was final on the important federal issue of whether New Jersey's courts may require J. McIntyre to defend a New Jersey state lawsuit consistent with due process of law, and the lower court's ruling on jurisdiction is not subject to further review in New Jersey's courts. As in this Court's cases, that J. McIntyre might prevail on the merits at trial does not remove this Court's ability to issue a writ of certiorari to review the judgment below. The finality

rule is satisfied because a finding by this Court that the lower court exceeded the bounds of the Constitution would bring an end to the litigation on the merits. *See Cox*, 420 U.S. at 485; *Shaffer*, 433 U.S. at 195.

CONCLUSION

For the foregoing reasons and those set forth in its Petition, J. McIntyre Machinery, Ltd., respectfully requests that this Court grant its petition for a writ of certiorari to the Supreme Court of the State of New Jersey.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 12 2010
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No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 3, 2010
CERTIORARI GRANTED SEPTEMBER 28, 2010

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1. Nicastro Plaintiffs' Complaint and Jury Demand, Filed September 22, 2003

2. J. McIntyre Machinery, Ltd.'s Answer and Jury Demand, Filed December 23, 2003

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8. Order Dismissing Complaint, Filed March 5, 2004

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12. Letter Opinion of Appellate Division, Reversing Dismissal, Filed May 26, 2005

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15. Letter Memorandum of Decision Dismissing Complaint, Filed November 3, 2006

16. Order Dismissing Complaint, Filed November 3, 2006

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18. Petition for Certification, Filed May 1, 2008

19. Order Granting Petition for Certification, Filed July 15, 2008

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1. Notice of Appeal, Filed March 25, 2004

2. Appellants' Case Information Statement, Filed March 25, 2004

3. Respondents' Case Information Statement, Filed April 8, 2004

***

8. Appellants' Brief and Appendix, Filed August 26, 2004

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10. Respondents' Brief and Appendix, Filed November 1, 2004

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12. Appellant's Reply Brief, Filed November 15, 2004

13. Opinion, Filed May 26, 2005

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17. Appellants' Brief and Appendix, Filed February 21, 2007

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19. Respondent's Brief and Appendix, Filed March 23, 2007

20. Appellant's Reply Brief, Filed April 9, 2007

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Supreme Court of New Jersey

1. Notice of Petition for Certification, Filed April 29, 2008

2. Petition for Certification and Supplemental Appendix, Filed May 12, 2008

3. Petitioner's Appellate Division Appendix, Filed May 12, 2008

4. Respondent's Brief, Filed May 28, 2008

5. Respondent's Appellate Division Appendix, Filed May 28, 2008

6. Petitioner's Reply Brief, Filed June 9, 2008

7. Order Granting Certification, Filed July 15, 2008

8. Order Granting Motion of New Jersey Association For Justice to Appear as *Amicus Curiae,* Filed October 17, 2008

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12. Brief on Behalf of *Amicus Curiae* New Jersey Association for Justice, Filed November 14, 2008

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14. Petitioner's Response to Brief on Behalf of *Amicus Curiae* New Jersey Association for Justice, Filed December 8, 2008

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24. Opinion of the Court, Filed February 2, 2010

25. Notice of Filing of Petition for Writ of Certiorari with the United States Supreme Court, Filed May 10, 2010

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APPENDIX B — COMPLAINT AND JURY DEMAND, FILED SEPTEMBER 22, 2003

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION

Docket No.: BER L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names), i/j/s/a,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiffs, Robert Nicastro and Roseann Nicastro, his wife, adult individuals residing at 3 Redstone Lane, Lodi, Bergen County, New Jersey, by way of Complaint against the defendants, says:

Appendix B

FIRST COUNT

1. Defendant, McIntyre Machinery America, Ltd. is a seller, distributor, and/or manufacturer of machinery, doing business in the State of New Jersey, with a principal place of business located at 895-G Hampshire Road, Stow, Ohio 44224. McIntyre Machinery America, Ltd. sells its products directly to customers in New Jersey; and, in particular, designed, manufactured, distributed and/or sold a machine known as a shear machine, model number 640 Shear, serial number 094-95, to plaintiff Robert Nicastro's employer, Curcio Scrap Metal, Inc., of 416 Lanza Avenue, Saddle Brook, Bergen County, New Jersey.

2. Defendant, J. McIntyre Machinery Ltd. is a manufacturer, designer, seller and/or distributor of machinery, doing business in the State of New Jersey, with a principal place of business located in Unit G, Acorn Park Ind. Est., Harriman's Lane, Dunkirk, Nottingham NG7 2TR, England; and, in particular, designed, manufactured, distributed and/or sold a machine known as a shear machine, model number 640 Shear, serial number 094-95, to plaintiff Robert Nicastro's employer, Curcio Scrap Metal, Inc., of 416 Lanza Avenue, Saddle Brook, Bergen County, New Jersey.

3. The defendants, John Does 1-10 and XYZ Corporations 1-10, fictitious names presently unknown to the plaintiff, designed, manufactured, sold and/or distributed the aforedescribed shear machine.

Appendix B

4. On or about October 11, 2001, plaintiff, Robert Nicastro, was employed by Curcio Scrap Metal, Inc., at their Saddle Brook, New Jersey location.

5. Within the course and scope of his employment, the plaintiff, Robert Nicastro, was required to operate a machine known as a shear machine, designed, manufactured, distributed and/or sold by the defendants, McIntyre Machinery America Ltd., J. McIntyre Machinery Ltd., John Does 1-10 and/or XYZ Corporations 1-10.

6. The shear machine was expected to, and did reach the employer, Curcio Scrap Metal, Inc., without substantial change in the condition in which it was sold.

7. During the course of plaintiff Robert Nicastro's work at Curcio Scrap Metal, Inc., the aforedescribed shear machine was being used by the plaintiff in the normal course of his employment duties, when the plaintiff's right hand came into contact with the shearing mechanism, causing severe injuries to the plaintiff's right hand, including but not limited to, amputation of several fingers.

8. The defendants, McIntyre Machinery America Ltd., J. McIntyre Machinery Ltd., John Does 1-10 and/or XYZ Corporations 1-10, are liable to the plaintiff, in a "Product Liability Action" pursuant to N.J.S.A. 2A:58C-2 in that the shear machine was not reasonably fit, suitable, or safe for its intended purpose because:

(a) It deviated from design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae;

(b) It failed to contain adequate warnings or instructions;

(c) It was designed in a defective manner so as to allow the plaintiff to become injured while operating the machine in the normal course of his employment.

The defendants are otherwise strictly liable in tort to the plaintiff according to the aforementioned "Product Liability Action" as may be revealed during the course of trial.

9. As a direct and proximate result of the defendants' strict liability in tort, the plaintiff, Robert Nicastro, has suffered and will suffer severe and permanent physical pain and suffering, has incurred and will incur in the future extensive medical expenses, and has suffered and will in the future suffer a loss and diminishment of income and wages, and such other and further damages as will be proven at the time of trial.

WHEREFORE, the plaintiff, Robert Nicastro, demands judgment against the defendants, McIntyre Machinery America Ltd., J. McIntyre Machinery Ltd., John Does 1-10 and/or XYZ Corporations 1-10,

individually, jointly, severally, and in the alternative, for damages in accordance with the laws of the State of New Jersey, together with interest, attorneys fees and costs of suit, and such other and further relief as a Court may deem fair and just.

SECOND COUNT

1. The plaintiffs hereby repeat and incorporate by reference all of the allegations contained in the First Count of the Complaint as if set forth in full at length herein.

2. Plaintiff, Roseann Nicastro, is the lawful wife of plaintiff, Robert Nicastro.

3. As a consequence of the injuries sustained by plaintiff Robert Nicastro, his wife, plaintiff Roseann Nicastro, has sustained a loss of consortium, including, but not limited to, a loss of the society and affection of her husband.

WHEREFORE, plaintiff Roseann Nicastro, demands judgment against the defendants, McIntyre Machinery America Ltd., J. McIntyre Machinery Ltd., John Does 1-10 and/or XYZ Corporations 1-10, individually jointly, severally, and in the alternative, for damages in accordance with the laws of the State of New Jersey, together with interest, attorneys fees and costs of suit, and such other further relief as a Court may deem fair and just.

Appendix B

RAKOSKI & ROSS, P.C.

BY: /s/

Dated: 9/17/03 ALEXANDER W. ROSS, JR.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a Trial by Jury of six as to all issues contained in this Complaint.

RAKOSKI & ROSS, P.C.

BY: /s/

Dated: 9/17/03 ALEXANDER W. ROSS, JR.

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to Rule 4:25-4 of the Rules of Court, that Alexander W. Ross, Jr., Esq. is hereby designated as trial counsel in this action on behalf of the plaintiffs.

RAKOSKI & ROSS, P.C.

BY: /s/

Dated: 9/17/03 ALEXANDER W. ROSS, JR.

Appendix B

CERTIFICATION PURSUANT TO RULES 4:5-1

Pursuant to Rule 4:5-1, to the best of my knowledge, information and belief at this time, the matter in controversy is not the subject matter of any other action pending in any Court, with the exception of a possible worker's compensation claim. There are no other pending arbitration proceedings, and no other such action or arbitration is contemplated, and further that there are no other parties known who should be joined in this action, with the exception of the fictitious names, presently unknown to the plaintiffs.

RAKOSKI & ROSS, P.C.

BY: /s/

Dated: 9/17/03 ALEXANDER W. ROSS, JR.

APPENDIX C — J. McINTYRE MACHINERY LTD.'S ANSWER, SEPARATE DEFENSES, JURY DEMAND AND DESIGNATION OF TRIAL COUNSEL, FILED DECEMBER 23, 2003

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — BERGEN COUNTY
DOCKET NO: BER-L-6857-03

Civil Action

ROBERT NICASTRO and ROSEANN NICASTRO, husband and wife,

Plaintiffs,

v.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

ANSWER, JURY DEMAND AND DESIGNATION OF TRIAL COUNSEL

J. McIntyre Machinery Ltd., by way of Answer to the Complaint of plaintiffs Robert Nicastro and Roseann Nicastro, his wife, say:

Appendix C

ANSWER TO FIRST COUNT

1. It makes no response to the allegations set forth in paragraph 1 as none of the allegations contained therein are directed towards or against it.

2. It admits that its principal place of business is located in Nottingham, England but denies the remaining allegations set forth in paragraph 2.

3. It makes no response to the allegations set forth in paragraph 3 as none of the allegations contained therein are directed towards or against it.

4. It is currently without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraphs 4 through 7.

5. It denies the allegations set forth in both paragraph 8's insofar as those allegations are directed towards or against it.

WHEREFORE, J. McIntyre Machinery Ltd. demand a judgment dismissing plaintiffs' Complaint with prejudice and with an award for all lawful costs and fees.

ANSWER TO SECOND COUNT

6. It repeats its answers to the allegations set forth in the First Count as if fully set forth at length herein.

7. It is currently without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 2.

8. It denies the allegations set forth in paragraph 3.

WHEREFORE, J. McIntyre Machinery, Ltd. demand a judgment dismissing plaintiffs' Complaint with prejudice and with an award for all lawful costs and fees.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The Complaint and all counts thereof fail to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Plaintiffs' claims are barred by the statute of limitations.

THIRD SEPARATE DEFENSE

This Court lacks personal jurisdiction over the answering defendant.

FOURTH SEPARATE DEFENSE

There has been no lawful service of legal process upon the answering defendants and plaintiffs' Complaint should be dismissed for this reason.

Appendix C

FIFTH SEPARATE DEFENSE

The answering defendant did not sell, supply or distribute any product which was defective in any manner and which caused injury to plaintiff Robert Nicastro.

SIXTH SEPARATE DEFENSE

If Robert Nicastro used any product that was manufactured, sold or distributed by the answering defendant, that product was materially and substantially altered from the time it was placed into the stream of commerce by the answering defendant, which alteration is an intervening and superceding cause of the alleged loss.

SEVENTH SEPARATE DEFENSE

If Robert Nicastro was injured by any product manufactured by the answering defendant, he was using the product in an unintended manner which was not reasonably foreseeable to the answering defendant.

EIGHTH SEPARATE DEFENSE

Robert Nicastro's negligence was a proximate cause of his alleged injuries and he is barred from making any recovery in this case, or his award must be reduced because of his comparative fault or negligence.

Appendix C

CLAIM FOR CONTRIBUTION

While denying liability to the plaintiffs in this action, if J. McIntyre Machinery Ltd. is adjudicated as being liable to the plaintiffs, it demands contribution from any and all defendants named and to be named in this action for their pro rata share of their responsibility for the plaintiffs' injuries and demands a credit for any settlement which is obtained by the plaintiffs with any party or tortfeasor whose conduct contributed to the plaintiffs' injuries or losses, and further demands a credit for plaintiffs comparative negligence in causing his injuries.

JURY TRIAL

McIntyre Machinery Ltd. demands a trial by jury as to all issues and counts so triable.

DEMAND FOR ANSWERS TO UNIFORM FORM A INTERROGATORIES TO BE ANSWERED BY PLAINTIFF IN ALL PERSONAL INJURY CASES: SUPERIOR COURT

J. McIntyre Machinery Ltd. demands that plaintiffs provide certified answers to Uniform Form A Interrogatories that are to be answered by plaintiffs in all personal injury cases: Superior Court within the time period provided by our Rules of Court.

Appendix C

DESIGNATION OF TRIAL COUNSEL

Mark T. McMenamy is hereby designated as J. McIntyre Machinery Ltd.'s trial counsel pursuant to Rule 4:25-6.

BRESSLER, AMERY & ROSS, P.C.

/s/
Mark T. McMenamy, Esq.
Attorneys for Defendant
J. McIntyre Machinery Ltd.

Dated: December 22, 2003

APPENDIX D — NOTICE OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND, IN THE ALTERNATIVE, TO QUASH SERVICE OF PROCESS, DATED JANUARY 26, 2004

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO: BER-L-6857-03

Civil Action

ROBERT NICASTRO and ROSEANN NICASTRO, husband and wife,

Plaintiffs,

v.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

TO: Alexander W. Ross, Jr., Esq.
Rakoski& Ross, P.C.
70 East Main Street
Marlton, New Jersey 08053-2142
Attorneys for Plaintiffs

NOTICE OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND, IN THE ALTERNATIVE, TO QUASH SERVICE OF PROCESS

Appendix D

COUNSEL:

PLEASE TAKE NOTICE that on Friday, February 20, 2004, at 9:00 a.m. or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant J. McIntyre Machinery, Ltd. will apply at the Bergen County Courthouse in Hackensack, New Jersey for the entrance of an order dismissing plaintiffs' Complaint, as to it, for lack of personal jurisdiction and, in the alternative, if its personal jurisdiction motion is denied, for the entrance of an order quashing service of plaintiffs' Summons and Complaint for plaintiffs' failure to comply with requirements of The Hague Convention concerning the lawful service of legal documents upon companies that are incorporated and located in the United Kingdom.

TAKE FURTHER NOTICE that in support of this application, J. McIntyre Machinery, Ltd. will rely upon the Certifications of John Midgley and Mark T. McMenamy and the Brief which has been filed in support of this application.

TAKE FURTHER NOTICE that no date has been set for either a pretrial conference or for a trial in this matter; that the filing fee for this application has been paid; that a proposed form of Order granting J. McIntyre Machinery, Ltd. the relief which it seeks on this motion is being provided herewith and that it requests oral argument if the motion is opposed by plaintiffs' counsel.

Appendix D

BRESSLER, AMERY & ROSS, P.C.

By:
Mark T. McMenamy, Esq.
Attorneys for Defendant
J. McIntyre Machinery, Ltd.

DATED: January 26, 2004

APPENDIX E — CERTIFICATION OF JASON MIDGLEY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, DATED JANUARY 24, 2004

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO: BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

v.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

CERTIFICATION OF JASON MIDGLEY IN SUPPORT OF J. MCINTYRE MACHINERY, LTD.'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND, IN THE ALTERNATIVE, TO QUASH SERVICE OF PROCESS

Appendix E

Jason Midgley certifies to the following facts:

1. I am the Managing Director of J. McIntyre Machinery, Ltd. ("McIntyre").

2. I have reviewed the plaintiffs' complaint in this action which relates to an October 2001 workplace accident at Curcio Scrap Metal in Bergen County, New Jersey.

3. McIntyre is a corporation organized under the laws of the United Kingdom. Its principal place of business is located in Nottingham, England.

4. McIntyre is in the business of manufacturing shearing machines.

5. McIntyre manufactured the shearing machine, which is at issue in this case, in 1995. The machine was made in Nottingham, England and shipped to the purchaser in Stow, Ohio in February 1995.

6. A company called McIntyre Machinery America, Ltd. ("MMA") purchased the shear. MMA is an Ohio corporation. Its principal place of business is located in Stow, Ohio. At all relevant times, MMA was in the business of buying shears from McIntyre and re-selling them to MMA's customers.

7. MMA is not now, nor has it ever been, affiliated with McIntyre. At no time was MMA ever a parent, subsidiary, or an affiliate of McIntyre. MMA is an

entirely separate entity and does not, and has never, shared either common owners or managers with McIntyre.

8. Based on plaintiff's allegations that the at-issue shear was in use at Curcio Scrap Metal in Saddle Brook, New Jersey in October 2001, it appears that MMA sometime between 1995 and 2001, re-sold the shear to Curcio Scrap Metal, or sold the machine to another entity, which in turn sold the shear to Curcio.

9. McIntyre did not have any knowledge of the transactions between MMA and its customers concerning the at-issue shear. McIntyre does not make it part of its business to track the shears past shipment to its customer.

10. McIntyre did not ship the machine from Ohio to New Jersey.

11. McIntyre does not directly market, advertise, sell or solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. In fact, McIntyre does not, and never did, maintain a sales staff in or for the United States.

12. McIntyre had no written distributorship contract with MMA.

13. MMA stopped buying McIntyre shearing machines in 2002.

14. McIntyre did not design the machine at issue in this case for market in New Jersey.

15. McIntyre did not establish channels to provide regular service or advice to customers in New Jersey.

16. McIntyre owns no property in New Jersey. It does not maintain an office or conduct any business in New Jersey.

17. McIntyre has no employees in New Jersey.

18. McIntyre has no agents in New Jersey.

19. McIntyre generates none of its revenues from and pays no taxes in New Jersey.

20. McIntyre does not have a telephone number, or a telephone directory listing in New Jersey.

21. McIntyre does not maintain a bank account in New Jersey.

22. McIntyre has never had a license to do business in New Jersey.

23. McIntyre has no contacts with New Jersey other than this lawsuit.

24. McIntyre learned of the above-captioned lawsuit when it received a letter dated October 30, 2003, via fax from Attorney Warren H. Gould of Fort Worth, Texas.

25. Apparently, the plaintiffs tried to effect service of process on Mr. Gould's client, Bobby Alexander, also of Fort Worth, Texas. Plaintiffs' Summons was addressed to "J. McIntyre Machinery, Ltd., c/o Bobby Alexander, 3700 N. Commerce, Fort Worth, TX 76106." Mr. Alexander is associated with Strip Technology, Inc.

26. In 2003, McIntyre began selling shearing machines to Strip Technology, Inc., in Texas, who resells these machines to its customers. Strip Technology, Inc., is entirely independent of McIntyre. McIntyre has no control over Strip Technology, Inc.'s operations or activities. There is no common ownership or management between Strip Technology, Inc., and McIntyre.

27. Mr. Alexander is not a director, officer, trustee, employee, or transferee of McIntyre nor is he authorized to accept service of process on behalf of McIntyre.

28. McIntyre does not have a registered agent authorized to accept service of process in New Jersey or any other state.

I certify that the foregoing statements made by me are true. I am aware that if any statements made by me is willfully false, that I am subject to punishment.

/s/
Jason Midgley

Dated: January 24, 2004

APPENDIX F — CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION

Docket No.: BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names), i/j/s/a,

Defendants.

CERTIFICATION OF ALEXANDER W. ROSS, JR.

Alexander W. Ross, Jr., Esquire, of full age, hereby certify as follows:

1. I am an attorney at law in the State of New Jersey and am representing the plaintiffs in this products

liability case with catastrophic personal injuries. As such, I am fully familiar with the facts stated herein.

2. In order to obtain an address in the United States for McIntyre Machinery Ltd., I went to the website of J. McIntyre Machinery, Ltd., which provides an address or Nottingham, England, UK. See Contents of Website, attached hereto as Exhibit "A".

3. From their website, I sent them an email from my office in Marlton, New Jersey, requesting information on the name and address of any U.S. sales or distribution centers. See E-mail dated October 22, 2003, attached hereto as Exhibit "B".

4. On that same day, I received an e-mail in response from J. McIntyre Machinery, advising me that they currently use "Strip Technology" in Texas for the sales of shears and balers. It provided contact information for a Bobby Alexander in Fort Worth, Texas. See E-mail dated October 22, 2003, attached hereto as Exhibit "C".

5. Also on the same day, I received an e-mail from Bobby Alexander, stating that he is the "North and South American Representative" for J. McIntyre Machinery. He also stated that he was contacting me at the request of J. McIntyre Machinery. See E-mail dated October 22, 2003, attached hereto as Exhibit "D".

6. I directed my secretary to serve the Complaint and Summons on Bobby Alexander in Fort Worth, Texas,

the admitted representative of J. McIntyre Machinery. See copy of certified mail return receipt, attached hereto as Exhibit "E". Defense counsel subsequently answered the Complaint on behalf of the defendant J McIntyre Machinery Ltd.

7. Attached hereto as Exhibit "F" is the invoice for the machine in question, evidencing that it was shipped from Ohio to New Jersey. The invoice is from "McIntyre Machinery America, Ltd." with a subtitle: "America's Link to Quality Metal Processing Equipment." It is clear that McIntyre Machinery America, Ltd., was the American distributor of McIntyre machines designed and manufactured in England.

9. Attached hereto as Exhibit "G" is documentation which came with the invoice. This document provides only the J. McIntyre Machinery address in Nottingham, England, not the McIntyre Machinery America, Ltd. address in Ohio.

10. Attached hereto as Exhibit "H" is a copy of the cover of the instruction manual which came with the shearing machine. The instruction manual has the Harriman's Lane, Nottingham, England, address on the front cover, with a sticker placed halfway over that address, supplying the McIntyre Machinery address in Ohio. Also provided in Exhibit "H" is page 8 of the instruction manual, which references USA standards as well as UK standards.

Appendix F

11. J. McIntyre Machinery is listed as an exhibitor at ISRI's 2002 Convention in Florida, *See* List of Exhibitors attached hereto as Exhibit "I".

12. Additionally, an article which appeared in "Recycling Today" on October 10, 2003, contains statements from Sally Johnson, J. McIntyre's managing director, stating:

> J. McIntyre Machinery is keen to stress that Strip-Tec is now the only company authorized to sell new McIntyre equipment following the demise of *our former agent McIntyre America in 2001.* [Emphasis added].

See Article, attached hereto as Exhibit "J".

13. Pictures of Mr. Nicastro's injuries, showing amputations and attempted reattachment of all four fingers on the left hand of this working man, are attached hereto as Exhibit "K"".

14. A copy of the Report of Plaintiff's Liability Expert, Wayne Nolte, P.E., is attached hereto as Exhibit "L". Mr. Nolte opines that the machine in question, manufactured by defendant J. McIntyre Machinery Ltd., was dangerously defective and in violation of applicable OSHA regulations.

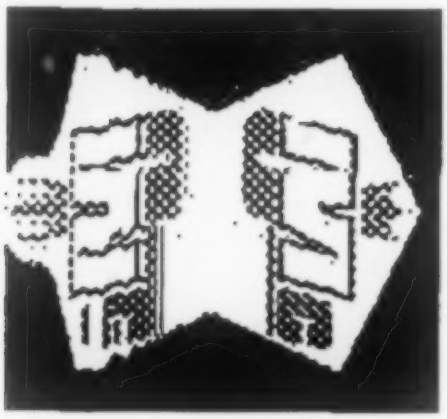
15. Attached hereto as Exhibit "M" are documents relating to service upon McIntyre pursuant to The Hague Convention.

Appendix F

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

ALEXANDER W. ROSS, JR.

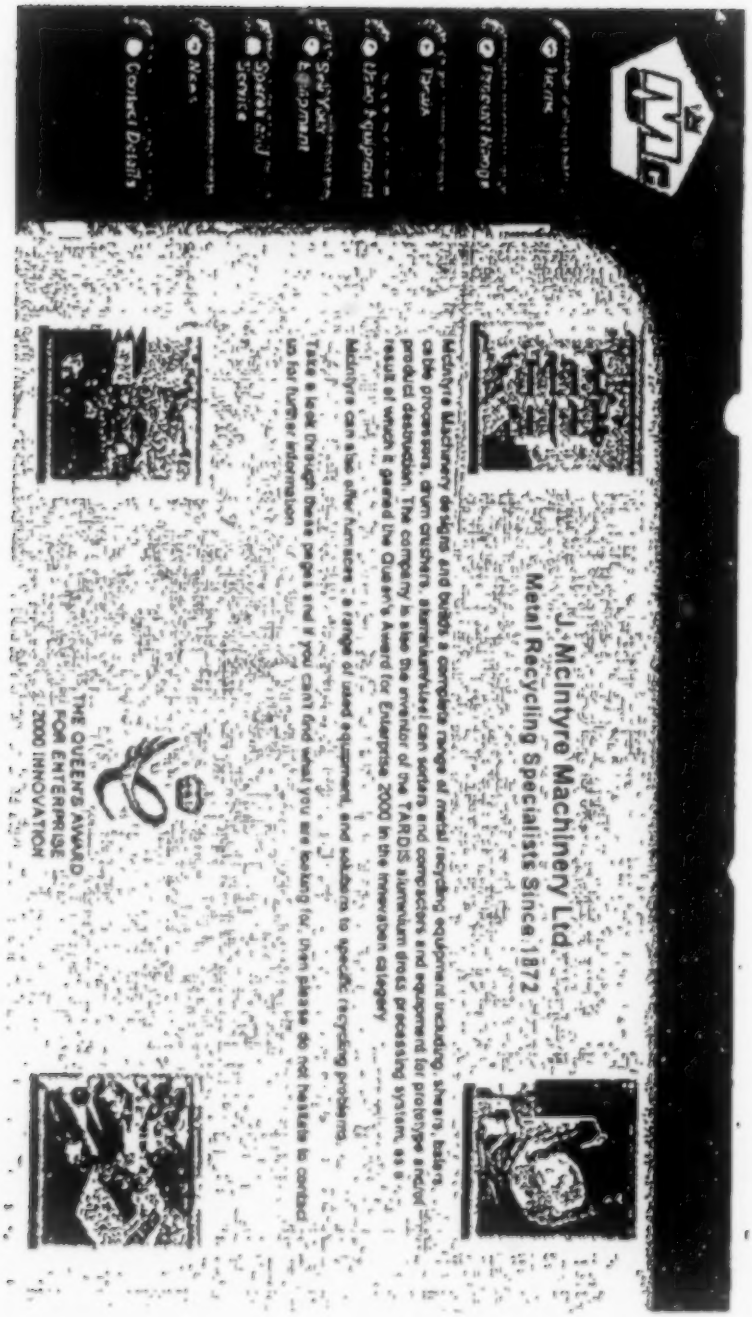
APPENDIX G — EXHIBIT A TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: PRINTED PAGES FROM WEBSITE OF J. McINTYRE MACHINERY, LTD.



J. McIntyre Machinery Ltd.

BEST AVAILABLE COPY

Appendix G


J. McIntyre Machinery Ltd.
Metal Recycling Specialists Since 1872
McIntyre Machinery designs and builds a complete range of metal recycling equipment including: sheers, balers, cable processors, drum crushers, shredders/swarf can sorters and compactors and equipment for prototype and test product destruction. The company is also the inventor of the TARDIS aluminium dross processing system, as a result of which it gained the Queen's Award for Enterprise 2000 in the Innovation category
McIntyre can also offer furnaces, a range of used equipment, and solutions to specific recycling problems.
Take a look through these pages and if you can't find what you are looking for, then please do not hesitate to contact us for further information
THE QUEEN'S AWARD FOR ENTERPRISE 2000 INNOVATION

Appendix G

J.McIntyre Machinery Ltd - Metal Recycling Equipment

J McIntyre Machinery Ltd designs, develops and manufactures a complete range of equipment for metal recycling including

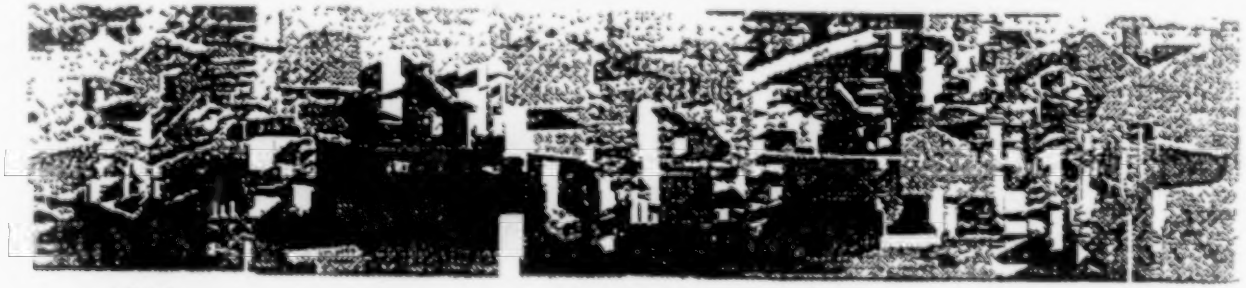
Metal Shears,
Balers,
Can Balers and Sorters
Drum crushers
Tardis - Aluminium dross processing
Ingot Casting Machines
Specialist - Products
Foundry Equipment

For further information please submit the ENQUIRY form

Appendix G

The
McIntyre Shear Range

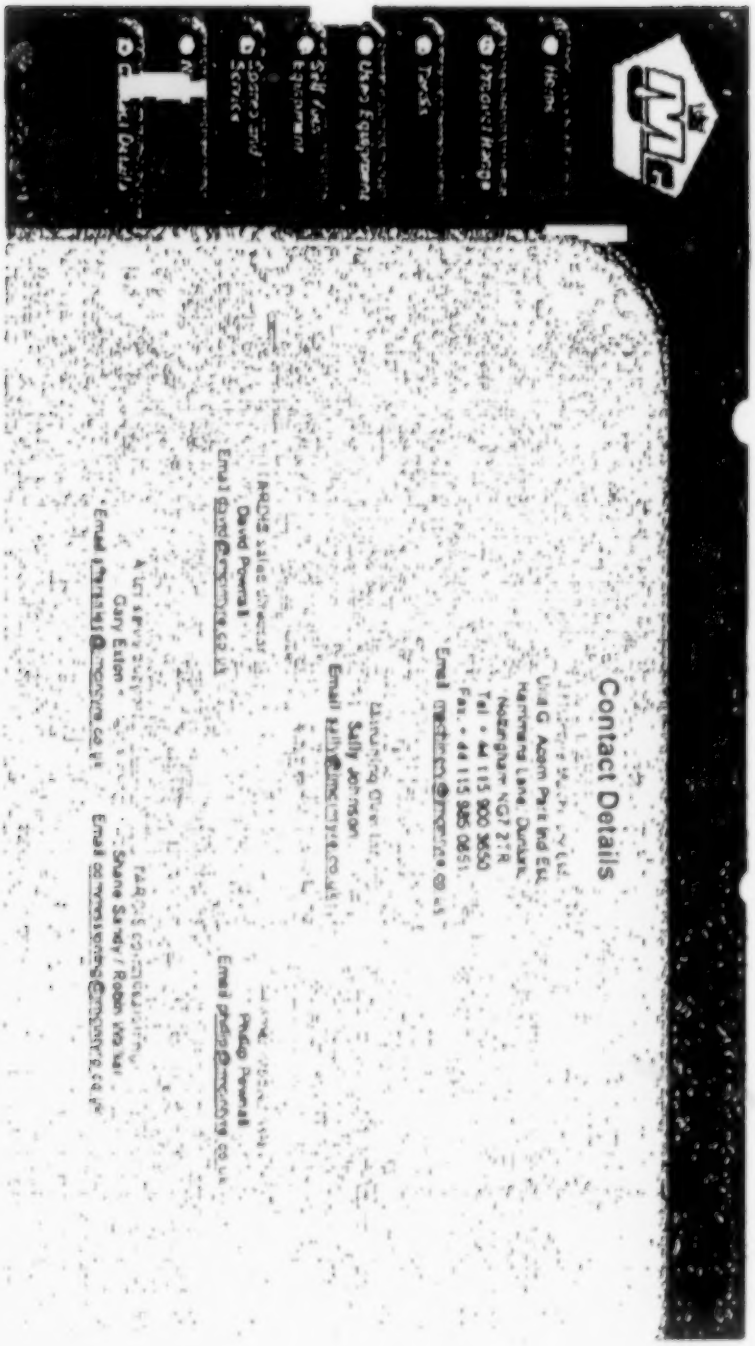
McIntyre shears were originally designed to withstand the rigours of scrapyard use, making them suitable for any industrial application. Still the market leaders in the metal recycling industry, McIntyre shears are rigorously tried and tested in McIntyre yards before being offered for sale. Blade lengths vary from 200mm to 600mm



200B	320S	407	4000	640
8"/200mm Blade	12"/320mm Blade	16"/407mm Blade	16 "/407mm Blade	25"/640mm Blade
40 tonne shear force	64 tonne shear force	79 tonne shear force	79 tonne shear force	183 tonne shear force
Cutting Capacity	Cutting Capacity	Cutting Capacity	Cutting Capacity	Cutting Capacity
Mild Steel 43A	Mild Steel 43A	Mild Steel 43A	Mild Steel 43A	Mild Steel 43A
36mm Dia	50mm Dia	58mm Dia	58mm Dia	76mm Dia
38mm Square	40mm Square	45mm Square	45mm Square	70mm Square

For further information please submit the enquiry form

Appendix G



Appendix G

APPENDIX H — EXHIBIT B TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: E-MAIL FROM PLAINTIFFS' COUNSEL TO MACHINERY@JMCINTYRE.COUK REQUESTING NAMES AND ADDRESSES OF U.S. SALES OR DISTRIBUTION OFFICES, DATED OCTOBER 22, 2003

From: "Alex Ross" <aross@rakoskiross.com>
To: <machinery@jmcintyre.co.uk>
Sent: Wednesday, October 22, 2003 8:58 AM
Subject: U.S. sales or distribution office

Please advise me of the name and address of any U.S. sales or distribution offices.

APPENDIX I — EXHIBIT C TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: E-MAIL FROM PHILLIP POWNALL, EXPORT SALES DIRECTOR OF J. McINTYRE MACHINERY LTD. TO PLAINTIFF'S COUNSEL, IN RESPONSE TO COUNSEL'S REQUEST FOR U.S. SALES OR DISTRIBUTION OFFICES, FORWARDED TO KARYN RICKARDS, DATED OCTOBER 22, 2003

From: "Alex Ross" <aross@rakoskiross.com>
To: "Karyn Rickards" <krickards@rakoskiross.com>
Sent: Wednesday, October 22, 2003 9:31 AM
Subject: Fw: US Distribution

Serve 'em.

Original Message
From: *Phillip Pownall*
To: *aross@rakoskiross.com*
Sent: Wednesday, October 22, 2003 10:20 AM
Subject: US Distribution

Hi Alex,

Thanks for your e mail. We use Strip Technology in Texas for the sales of shears and balers.

Appendix 1

Contact Info:

Bobby Alexander
3700N Commerce
Fort Worth
Texas
76106

0018176261504
0018176252207

bobbymalexander@hotmail.com

Best Regards

Phillip Pownall
Export Sales Director
J McIntyre Machinery Ltd
Tel 00441159003658
Fax 00441159850651
Mobile 07764826476

phillip@jmcintyre.co.uk
www.jmcintyre.co.uk

APPENDIX J — EXHIBIT D TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: E-MAIL FROM BOB ALEXANDER, PRESIDENT, STRIP TECHNOLOGY INC., TO PLAINTIFF'S COUNSEL, FORWARDED TO COUNSEL'S ASSISTANT TO SERVE STRIP TECHNOLOGY, FORWARDED TO KARYN RICKARDS, DATED OCTOBER 22, 2003

From: "Alex Ross" <aross@rakoskiross.com>
To: "Karyn Rickards" <krickards@rakoskiross.com>
Sent: Wednesday, October 22, 2003 10:34 AM
Subject: Fw: McIntyre Machinery Representative

Serve 'em.

Original Message
From: *Bobby Alexander*
To: *aross@rakoskiross.com*
Sent: Wednesday, October 22, 2003 10:45 AM
Subject: McIntyre Machinery Representative

Alex;

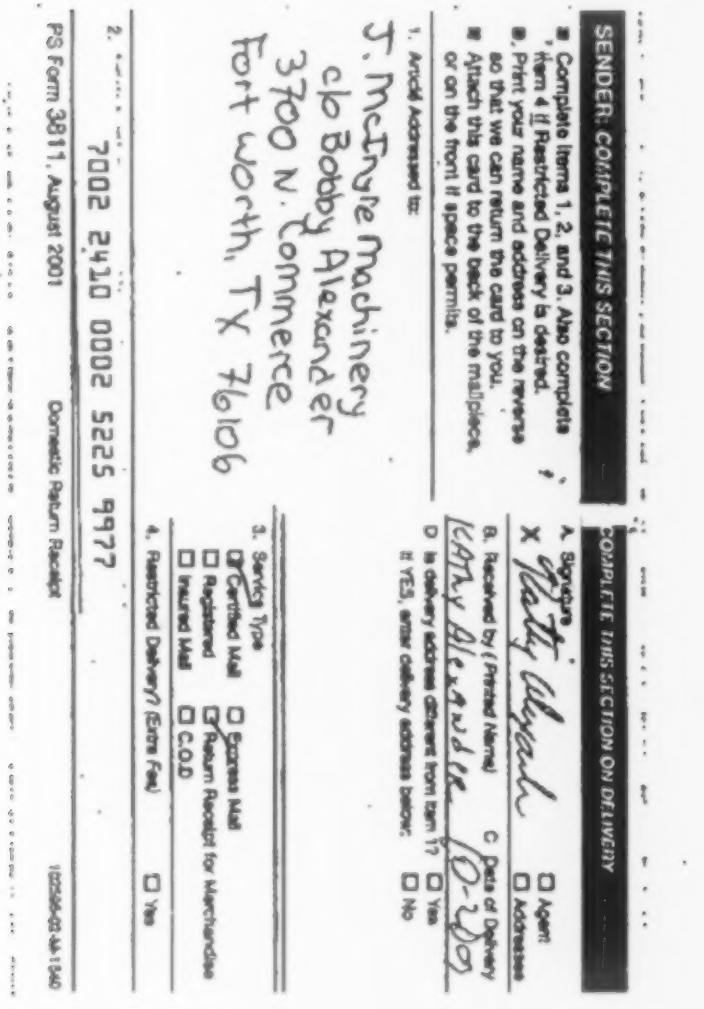
Good morning. My name is Bob Alexander of Strip Technology, Inc. in Fort Worth, Texas. Strip Tec. is the North, and South American Representative for McIntyre Machinery. I am sending you my contact information at the request of McIntyre Machinery getting an e-mail from you. If I can be of *any* assistance to you, contact me anytime.

Appendix J

Best Regards
Bob Alexander
President

Strip Technology, Inc.
3700 North Commerce Street
Fort Worth, Texas 76106
800-426-4126 Office
817-625-2207 Fax.
Bobby@StripTec.com e-mail
www.StripTec.com web address

APPENDIX K — EXHIBIT E TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: CERTIFIED MAIL RETURN RECEIPT ADDRESSED TO BOB ALEXANDER



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

J. McIntyre Machinery
c/o Bobby Alexander
3700 N. Commerce
Fort Worth, TX 76106

2. [illegible] 7002 2410 0002 5225 9977

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Kathy Alexander ☐ Agent ☐ Addressee

B. Received by (Printed Name) Kathy Alexander C. Date of Delivery 10-2-03

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

APPENDIX L — EXHIBIT F TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: McINTYRE MACHINERY AMERICA, LTD.'S AUGUST 25, 1995 INVOICE FOR SALE OF A MCINTYRE MODEL 640 SHEAR TO CURCIO SCRAP METAL

McINTYRE MACHINERY AMERICA, LTD.
America's Link to Quality Metal Processing Equipment
887-I Hampshire Road
Stow, OH 44224, U.S.A.
Phone: 216-922-4330 Fax: 216-922-4343

330

INVOICE

INVOICE NO: 950414
DATE August 25, 1995

Bill To:
Curcio Scrap Metal
418 Lanza Ave.
Saddlebrook, NJ 07662
ATTN Mike Curcio

Ship To:
Same

Ph 201-478-3133

SALESPERSON	P.O. NUMBER	DATE SHIPPED	SHIPPED VIA	F.O.B. POINT	TERMS
Joe Latona	Verbal- Mike	8/25/95	Customer Carrier	Stow, OH	Check

QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT
1	McIntyre Model 640 Shear, 440 volt	$24,900.00	$24,900.00
			$ 0.00
			$ 0.00
			$ 0.00
			$ 0.00
			$ 0.00
			$ 0.00
		SUBTOTAL	$24,900.00
		SALES TAX	
		SHIPPING & HANDLING	
		TOTAL DUE	$24,900.00

Make all checks payable to McIntyre Machinery of America, Inc.
If you have any questions concerning this invoice, call: Mary Gaither, 216-922-4330

Ap. 8/31/96
CK# 38187

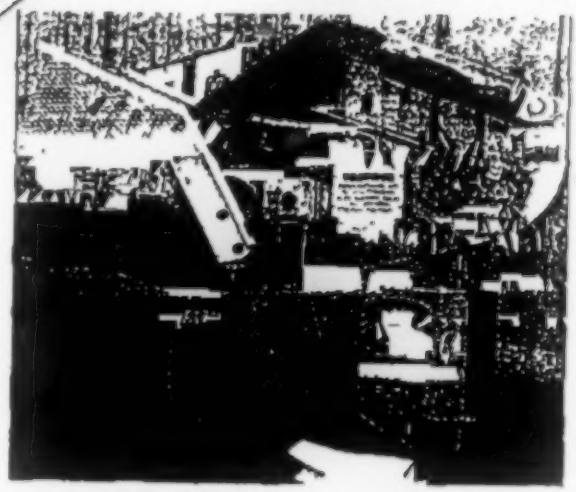
THANK YOU FOR YOUR BUSINESS!

GOIN' MR. ROSS

APPENDIX M — EXHIBIT G TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: EXCERPT OF J. McINTYRE MACHINERY LTD. 640 GOLD SHEAR PRODUCT BROCHURE

MACHINERY

640 Gold



The McIntyre 640 Gold offers unbelievable performance at an unbeatable price, a modern shearing machine which will be an asset to both Ferrous and Non-Ferrous operations.

UNBEATABLE

Construction of this machine follows McIntyre's well-proven design route, offering simplicity of operation together with shearing performance – often unmatched by machines at twice the price

HIGH PERFORMANCE

With a massive cutting capacity of upto 3" (76mm) dia. on mild steel bar, major features of the 640 Gold include easy to operate control to give automatic continuous stroke as an alternative to foot pedal operation, a shearing height which will reduce operator fatigue and extra heavy duty jaw pivot bearings which will ensure a long machine life and allows the operator to safely cut metals by single or continuous action The operator guard and safety rail are supplied as standard on all 640 Gold Shears. Optional equipment includes forced draft cooling for hot climates and all-immersed tank heaters for cold climates.

SERVICEABLE

An additional advantage of the 640 Gold is that its design incorporates off-the-shelf hydraulic parts from suppliers with international sales outlets – guaranteeing serviceability well into the future – wherever you may be based

VERSATILE

A choice of Shearing or

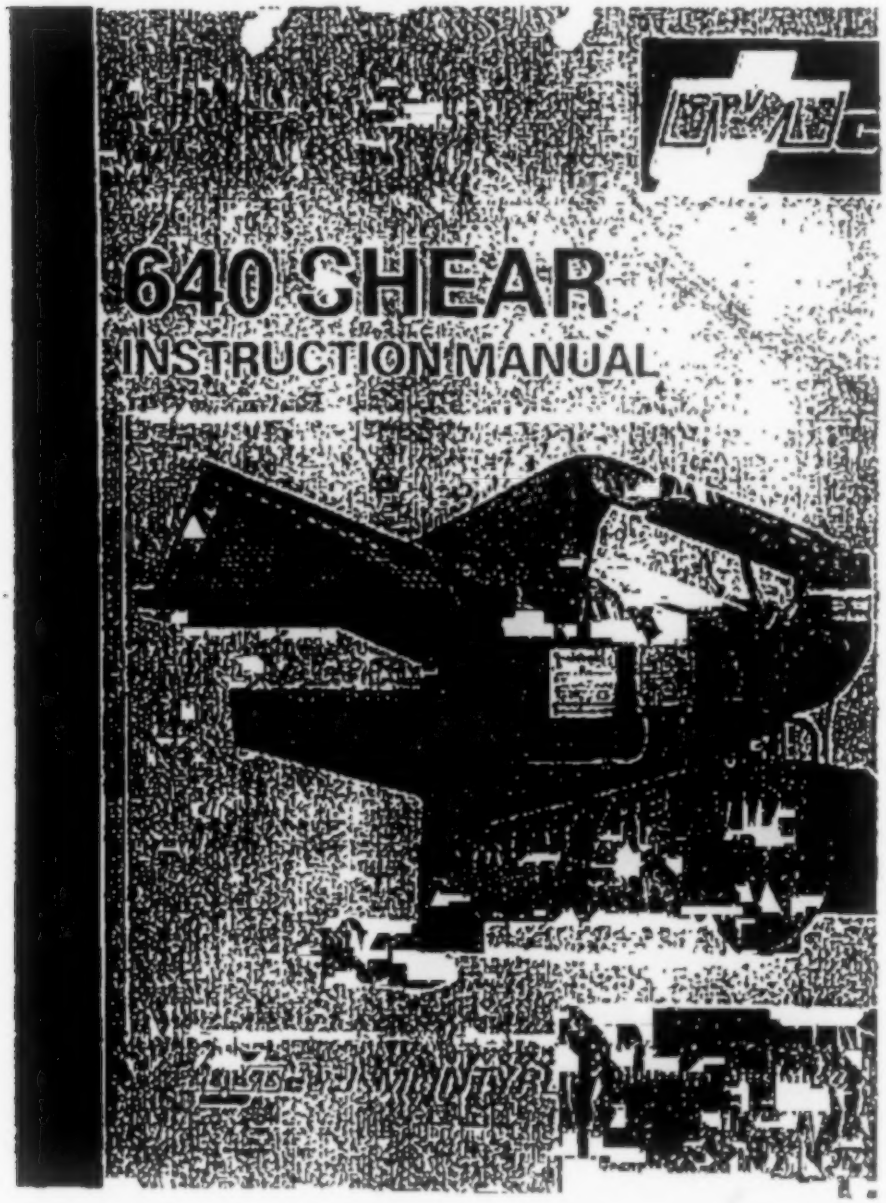
TRIED AND TESTED

Since its introduction, the 640 Gold has proved that it is as tough as it looks Only after a year of successful operation was the product launched onto the market.

Examples are now in use throughout the World and the shear has proved to be rugged, reliable and adaptable, well capable of withstanding heavy scrap yard use combined with cost effective operation.

J McIntyre Machinery Ltd
Unit 7 Lenton Lane
Dunkirk Nottingham
NG7 2SD
Phone 0115-978 0781
Fax: 0115-942 2357

APPENDIX N — EXHIBIT H TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: COVER AND PAGE 8 FROM A J. McINTYRE MACHINERY LTD. 640 SHEAR INSTRUCTION AND SAFETY MANUAL

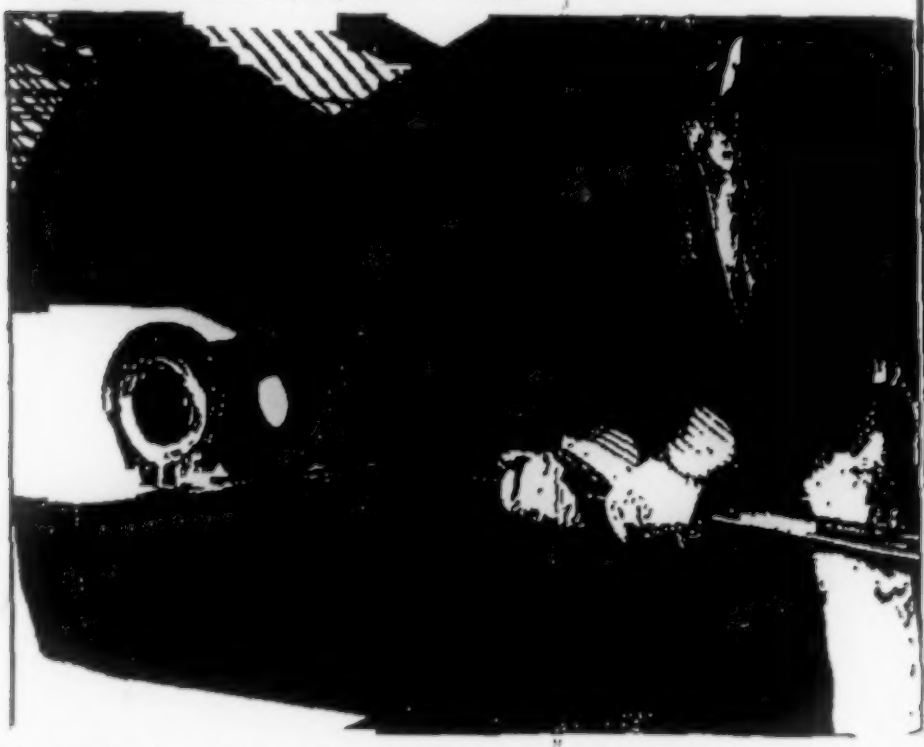


Appendix N

The following protective clothing must be worn at all times whether operating or adjusting the 640 Shear.

Safety goggles with side screens or full face safety visor.
Safety helmet (hard hat).
Protective safety boots.
Gloves and protective apron.
In addition to the above ear protection must be worn whilst using the diesel model 640 Shear

The owner and operators of a 640 Shear must make themselves aware of the Health and Safety at Work Regulations (UK) and the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment. Trade organisations such as the British Scrap Federation, The Secondary Metals Association (UK) and The Institute of Scrap Iron and Steel (USA) are good sources for up to date working practices and regulations or where they may be obtained from.



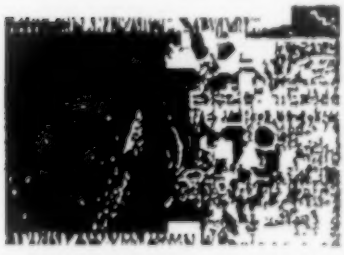
Practice Shearing small items with the aid of tongs or long handled pliers.

APPENDIX O — EXHIBIT I TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: LIST OF EXHIBITORS AT INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.'S 2002 EXPOSITION

Environmental Expert.com Events

Home | Business Center | Publications | Articles | News | Magazines | Upcoming Events
Job Search | Training | Software House | Technology Providers | Tools | Directory

ISRI : Annual Exposition Storefront



For more information

- Request Registration Package
- Visit our Web Site
- Send us an E-mail

Event information

- Event: ISRI's Annual Exposition
- Date: 8-12 April 2003
- Venue: Marriott World Center, Orlando, FL, USA
- Contact Person: [illegible]

ISRI's Annual Exposition Marriott World Center, Orlando, FL, USA

ISRI's 2003 Annual Convention and Exposition gives you the opportunity to demonstrate state-of-the-art equipment and service offerings that can help ISRI members run their companies with maximum efficiency and improved profits.

Information

- Exhibitor Prospectus
- Who Should Exhibit
- Sponsorship Opportunities

Institute of Scrap Recycling Industries, Inc
1325 G Street N.W. Suite 1000
Washington, DC 20005-3104

Exhibitors

Exhibitor Marketing Opportunities

ISRI's Annual Exposition—The Scrap Recycling Industry's No. 1 Trade Show in the World, to be held April 8-12, 2003 Marriott World Center, Orlando, Fla.

Showcase Your Products and Services to 3,000 Scrap Industry Representatives

The Institute of Scrap Recycling Industries presents the world's largest scrap recycling industry trade show each year. More than 3,000 interested buyers of scrap processing and recycling equipment, products and services look forward to ISRI's Annual Convention primarily because this exposition provides them with the most comprehensive industry related shopping experience assembled in a single [illegible] location.

Appendix O

ISRI's 2003 Annual Convention and Exposition gives you the opportunity to demonstrate state-of-the-art equipment and service offerings that can help ISRI members run their companies with maximum efficiency and improved profits.

Exhibitor space goes fast, so sign up today and join us in Orlando in 2003 where the scrap recycling industry will be Exploring New Horizons.

Exhibitor Prospectus

Convention and Exposition Attendance

Expect to see lots of attendees, at least 3,000, probably more. The exposition is the centerpiece of ISRI's Annual Convention. Each year it draws owners as well as senior and middle managers of scrap processing companies, brokerage firms, mills, refineries, and other industrial consumers of scrap commodities. Purchasing agents, financial officers, operations managers, quality control personnel, marketing and sales managers, and environmental engineers also attend.

Show Features

- Indoor exhibition space in the Marriott World Center—205 10' x 10' booths
- Flexible outdoor space to present your equipment—regardless of size—to best advantage
- 7 hours of guaranteed exhibit time scheduled with no competing convention events
- The convention kick-off event—a lavish reception—and at least two other catered events—within the Exhibit Hall and among the outdoor exhibits
- A free listing in *Scrap* magazine
- ISRI's Hospitality Lounge, second in convention popularity only to the show itself, will be located in the center of the Exhibit Hall

Show Hours

Thursday, April 10, 6:30-10 p.m.
Gala Opening Reception

Friday, April 11, 9:30 a.m.-5 p.m.
Exhibit Hall Luncheon

Saturday, April 12, 9 a.m.-4 p.m.
Exhibit Hall Luncheon

Space and Fees

Booth Space
Each 10' x 10' Booth Space
ISRI Members—$3,000

Nonmembers' first space—$5,400*

Each Additional 10' x 10' Booth Space—$3,000
(Members and Nonmembers)

*This figure is equivalent to the member booth rate, plus the ISRI 2003 Associate Domestic Member national and chapter dues rate. In order to qualify for the member rate, exhibitors must be ISRI members in good standing by Feb. 1, 2003. Contact ISRI at 877/FOR-ISRI for information about becoming a member.

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Oversize Equipment Space
$10 per square foot when purchased with at least one 10' x 10' booth space or the equivalent cost of that booth space (ISRI members: $3,000; nonmembers: $5,400)

Installation and Dismantling
Booth Space
Begins Wednesday, April 9, 8 a.m.-midnight.* Completed by Thursday, April 10, 2 p.m. All display materials must be removed by Sunday, April 13, 12 noon.

Oversize Equipment Space
Begins Monday, April 7, 8 a.m.-midnight.* Completed by Thursday, April 10, 2 p.m. Dismantling must be completed by Sunday, April 13, midnight.

*Both booth and oversize equipment installation must be prescheduled with the exposition service contractor.

Exhibitors

Who Should Exhibit?

Attendees are interested in seeing—and purchasing—new equipment for processing scrap ferrous and nonferrous metals, paper, glass, plastics, rubber, and/or textiles; vehicles for transporting them; equipment parts and accessories to complement scrap processing equipment; products and services to help sell them, including Internet commerce and computer hardware and software technologies; and anything that will help them operate their companies profitably and efficiently. Financial, environmental, and safety consulting services are all in high demand at ISRI's show. Related industrial products, such as uniforms or employee incentives, also generate sales interest.

You may have a product or service not traditionally known to the scrap recycling industry. All the more reason to exhibit at the Marriott World Center with ISRI. The scrap industry is anxious to try what is new, especially when ISRI will be urging attendees to join the association in Exploring New Horizons.

But there's something you need to know: so successful is ISRI's show that space disappears FAST. Half of all booth spaces for the 2003 show were already sold in mid-April 2002, nearly a year before the actual show!

Popular Exhibitor Products and Services at a Glance

- Scrap processing equipment for ferrous and nonferrous metals, paper, glass, plastics, rubber, and textiles
- Equipment parts and accessories
- Broker services
- Computer hardware and software designed to meet the special needs of scrap recycling operations, including scrap brokers
- Internet commerce providers
- Environmental technology
- Transportation vehicles and services
- Financial and insurance services tailored to scrap recyclers
- Communications services and technology
- Promotional items to assist scrap recyclers in their sales, public relations, and customer service activities
- Business forms
- Innovative technology and other new services scrap recyclers need to know about and purchase
- Business publications and related media

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- Uniforms
- Employee Incentives

2002 Exhibitor

Aggregates Equipment, Inc
Al-jon, Inc
Allied-Gator, Inc
Amada Cutting Technologies, Inc
American Baler Company
American Iron & Metal Company, Inc
American & Ohio Locomotive Crane Co
American Pulverizer Company
American Shear Knife Division of ASKO, Inc
Anheuser-Busch Recycling Corp
Ansam Metals Corp
Anvil Attachments
Bakker Magnetics, B V
B E S T , Inc
Bureau of International Recycling (BIR)
Cargotec, Inc
Case Corporation
Caterpillar, Inc
Central Manufacturing Co
Clement Industries, Inc
CNA Commercial Insurance
Columbia Steel Casting Co , Inc
Commodities Management Exchange, Inc
CP Manufacturing
Data Transmission Network (DTN)
John Deere Commercial Worksite Products
ECS Underwriting, Inc.
EDAX, Inc
Enterprise Co
Envirogen, Inc
Erez Magnetics
Esco Corporation
Excel Manufacturing, Inc
Forrester Environmental Services, Inc
FUCHS, A Division of Schaeff of North America, Inc
General Kinematics Corporation
Genesis Equipment & Manufacturing, Inc
Gensco Equipment (1990) Inc
Global Metals, Ltd
Global Recycling
Hagglunds Drives, Inc
Harris Press & Shear
Heartland Aluminum, Inc
Hustler Conveyor Company
Innov-X Systems
International Association of Electronics Recyclers
International Baler Corp
R.M. Johnson Co , Inc
S C Johnson, A Family Company
Keith Manufacturing Company
Komatsu America International Co
LBX Company, L L C
Lefort USA
Liebherr Construction Equipment Co
Logemann Brothers Co
Metal Bulletin, Inc /AMM
Metal Management
Metorex, Inc
Metso Minerals, Inc , Recycling Division
Milton Technologies
MSA ScrapSite
MTB Recycling
NASCO-OP
Ningbo Zhenhai Renewable Resources
Processing Park Development Co , Ltd
Niton Corp
Norfolk Southern Corp
Ohio Magnetics, Inc
Osborn Engineering, Inc
Oxford Instruments America, Inc
Platts
ProfitGuard/Global Commercial Credit
Rad/Comm Systems Corp
Recy Systems, A G
RecycleGuardsm Insurance Program
RecycleNet Corporation
Recycling International Magazine
Recycling Today Media Group
Riverside Products/Newell Riverside
Rotobec USA, Inc
Saint Gobain Crystals & Detectors
Scrap Magazine
ScrapWare Corporation
Sennebogen, L L C
SETCO Solid Tire & Rim Assembly
The Shared Logic Group, Inc
Shred-Tech, Inc
Sierra International Machinery
Solartron Analytical
Spectro Alloys Corp
Spectro Analytical Instruments
SSI Shredding Systems, Inc
Stanley Hydraulic Tools LeBounty Attachments
Steel Recycling Institute
Steinert/Resource Recycling, L L C
Strip Technology, Inc
Sweed Machinery
Systems Alternatives International, L L C
T Y Cushion Tire, L L C
Texas Shredder, Inc
Thermo Eberline
Thermo MeasureTech
Transact Payment Systems
Triple/S Dynamics
Tube City, Inc
Tung Tai Group
21st Century Programming
US Conveyor Technologies Mfg , Inc
US Motor Recycling, Inc
Vezzani USA, Inc

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Ludlum Measurements, Inc
Lynxs Shredder Corp
Mac Crushers/Balers Div of Granutech-Saturn Systems Corp
Mack Manufacturing, Inc
Magnetech Engineering, Inc
Magnetech Industrial Services, Inc
Marathon Equipment Co
Mayer Information Technology
Mayfran International
J McIntyre Machinery, Ltd
Volvo Construction Equipment
Walker Magnetics
Waste News
Wendt Corp
Winkle Industries
Worldwide Analytical Systems, Inc
Young Corporation

How to Purchase Space for ISRI's 2003 Exposition

- Complete and sign the ISRI Contract to Exhibit
- Complete the ISRI Exhibitor Contact Information Sheet.
- Send both forms with complete payment to
- Institute of Scrap Recycling Industries, Inc
  1325 G Street N W , Suite 1000
  Washington, DC 20005-3104
  Note Payment must be by check in U S funds drawn on a U S bank and payable to the Institute of Scrap Recycling Industries, Inc

For Space Availability and Other Information
Contact ISRI Show Manager
Cara Stann, Operations Manager
Telephone 703/998-6003
Fax 703/998-6005
E-mail cstann@msginonsries com

Exposition Floor Plan

- To view or download the exposition floor plan in a PDF file, click here
- Height Limit 8'
- Ceiling Height 23'
- Load Capacity 400 lbs per square foot
- Freight door dock entrance 16'' wide x 18'6'' high

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APPENDIX P — EXHIBIT J TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: ARTICLE FROM RECYCLING TODAY WEBSITE, DATED OCTOBER 10, 2003

U.K. COMPANY CONNECTS WITH STRIP-TEC

10/10/2003

Strip Technology Inc. (Strip-Tec), Fort Worth, Texas, has recently ordered its second container load of alligator shears manufactured by J. McIntyre Machinery Ltd., Dunkirk, U.K.

"Since having been appointed sole agents for the McIntyre shear range only six months ago, Strip-Tec has placed an order for its second container of equipment," a news release from the British equipment maker states.

Strip-Tec president Bobby Alexander says his company is carrying J. McIntyre shears in stock at the company's facility in Fort Worth while also holding a spare parts inventory to offer "excellent back-up support for the McIntyre shear range."

Sally Johnson, J. McIntyre's managing director, has also advised North American buyers to deal only with Strip-Tec for the purchase of new J. McIntyre shears.

"J. McIntyre Machinery is keen to stress that Strip-Tec is now the only company authorized to sell new McIntyre equipment following the demise of our former agent

McIntyre America in 2001," says Johnson, referring to a former Ohio-based distributor.

Johnson has asked recyclers who learn of any North American companies offering new McIntyre shears other than Strip-Tec "or its appointed representatives" to contact Strip-Tec in the U.S. at (800) 426-4126 or J. McIntyre Machinery Ltd in the U.K. at +44 115-900-3650. "These machines may not have been authorized for sale by the manufacturer, and as such may be being sold illegally and without the latest operating instructions, warning labels and operator guarding," Johnson says of equipment offered in North America by someone other than Strip-Tec.

Johnson also says any McIntyre customers who purchased their machines from the prior distributor "are encouraged to register their equipment with Strip-Tec in order to receive information on latest equipment updates and allow McIntyre and Strip-Tec to offer full support and competitive pricing on genuine McIntyre spare parts."

Friday, October 10, 2003

APPENDIX Q — EXHIBIT K TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: PHOTOGRAPH OF PLAINTIFF ROBERT NICASTRO'S RIGHT HAND

APPENDIX R — EXHIBIT L TO CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS, FILED FEBRUARY 24, 2004: REPORT OF PLAINTIFFS' EXPERT WAYNE F. NOLTE, PH.D., P.E., DATED OCTOBER 24, 2003

- ENGINEERING REPORT -

ENGINEERING EVALUATION OF MACHINE ACCIDENT

ROBERT NICASTRO

VS

MC INTYRE MACHINE

ALEXANDER W. ROSS, JR., ESQUIRE
RAKOSKI AND ROSS
ATTORNEYS AT LAW
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OCTOBER 24, 2003 3-151

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INTRODUCTION

Alexander W. Ross, Jr., Esquire, of the law firm Rakoski and Ross, 76 East Main Street, Marlton, New Jersey requested an engineering evaluation of an accident involvng a McIntyre machine.

Mr. Ross represents Robert Nicastro, Plaintiff, in this matter. Mr. Nicastro sustained a loss of four fingers on his right hand from this accident.

Inspection of the subject McIntyre machine was conducted at Curcio Scrap Metal, 416 Lanza Avenue, Garfield, New Jersey. Photographs and measurements taken at that time are contained herein.

MATERIALS REVIEWED

The following materials were reviewed as part of this evaluation:

1. Product Investigation Guide.
2. Seven (7) color photocopies of photographs showing the machine.
3. J. McIntyre 640 Shear Instruction Manual.
4. American National Standard ANSI Z268.1 A-1978.

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DESCRIPTION OF ACCIDENT

The subject accident occurred on October 11, 2001 at approximately 11:55 A.M. Robert Nicastro started work that morning at 7:30 A.M. He wore a Jets sweatshirt and had gloves on when this accident occurred. He started working at this job approximately thirty years ago. He has been operating the machine involved in this accident since it was received at the plant in either 1995 or 1996.

Mr. Nicastro, just prior to this accident, had been working on the machine on and off that morning. A customer needed his assistance, he stopped work and shut off the machine. He was with a customer for a few minutes and then went back to the machine. When he got to the machine he went to the control box and turned it on.

Mr. Nicastro bent down to pick up a piece of copper and aluminum thin tube radiation approximately three feet (3') to four feet (4') in length. He had been working with this material and cutting it that morning. He bent down to pick up this piece of material and slipped. He does not know what he slipped on. However, his right hand went into the machine and the shear blade came down on his right hand. Mr. Nicastro, who was wearing gloves, lost four fingers in this accident.

DESCRIPTION OF MACHINE

The machine operated by Robert Nicastro at the time of this accident is identified as a J. McIntyre 640

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Shear Machine. It was manufactured by J. McIntyre Machinery, Ltd., Dunkirk, Nottingham, England. The machine contains the serial number 094-95 and was manufactured in 1995.

The machine was purchased through McIntyre Machinery America, Limited, 887-1 Hampshire Road, Stow, Ohio on August 25, 1995.

The machine has an overall length of eighty-six point five inches (86.5") and an overall height of sixty-six inches (66") to seventy inches (70"). The length of the machine, including the guard, is ninety-seven inches (97").

The machine has a blade length twenty-five and one-quarter inches (25-1/4") and a tip to tip blade opening of thirteen and one-quarter inches (13-1/4"). The 640 Electric Shear Machine operates with a force of 3.03 tons. The machine is capable of making seven (7) cuts per minute with the jaw fully open. The same machine can make fifty-three (53) cuts per minute when the jaw is limited to an opening of one and one-half inches (1-1/2").

The machine contains a fixed guard with a base that is parallel to the cutting surface and elevated above that surface eight and three-eighth inches (8-3/8"). The opening under the guard and to the cutting blade was unrestricted.

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The PHOTOGRAPHIC RECORD to this report contains several photographs of the accident machine.

PHOTOGRAPHS l and 2 are views of the machine.

PHOTOGRAPH 3 shows the manufacturer's plate on the machine.

PHOTOGRAPH 4 shows one of the controls for the run of the machine.

PHOTOGRAPH 5 is a view of the machine controls.

PHOTOGRAPH 6 also shows the machine controls.

PHOTOGRAPH 7 is a view of the pedal controls.

PHOTOGRAPH 8 shows the machine guard and the shearing blade.

PHOTOGRAPH 9 shows the handle at thirty-one and one-half inches (31-1/2") in length.

PHOTOGRAPH 10 shows the blade at twenty-four and one-quarter inches (24-1/4").

PHOTOGRAPH 11 shows the opening between the anvil and the underside of the guard.

PHOTOGRAPH 12 shows that the opening is eight and three-eighth inches (8-3/8").

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DISCUSSION

The L. McIntyre Instruction Manual for the 640 Shear Machine addresses the operator guard and indicates that it should be correctly fitted and in place according to illustration A on page 11. The photograph of the machine contained in illustration A on Page 11 shows an opening on the underside of the guard to the cutting anvil. It does not show a guard that protects an operator from contact with the blade. The guard on the machine at the time of this accident was in the same configuration as shown in this instruction manual. Mr. Nicastro had the machine set with a blade to operate at the maximum opening yielding the fewest number of cuts per minute.

The instruction manual also indicates that the shear machine conforms with the American National Standards for scrap metal processing equipment. The American National Standard (ANSI Z268.1-1974) titled "Safety Requirements for Design, Use and Maintenance of Metal Scrap Processing Equipment" expresses its purpose as establishing safety requirements for the design, construction, maintenance and operation of equipment used for shearing, crushing, classifying and compressing metallic scrap materials before, during and after processing.

> "1.1 Scope. The requirements of this standard apply to the design, use, and maintenance of equipment for metal scrap shearing, crushing, classifying, and compressing, and for equipment used particularly in moving scrap materials.

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1.2 Purpose. The purpose of this standard is to establish safety requirements for the design, construction, maintenance, and operation of equipment used for shearing, crushing, classifying, and compressing metallic scrap materials before, during. And after processing."

The Standard further indicates that it is designed to form the basis for safety regulations to be established by federal, state and local government agencies.

"1.3.1 General. This standard is designed to form the basis for safety regulations to be established by federal, state, and local governmental agencies. It is intended to supplement, rather than supersede, such regulations."

The ANSI Standard describes the metal scrap processing equipment known as the alligator shears.

"2.1 Scrap Shearing Equipment

2.1.1 Alligator Shears. This machine consists of a stationary horizontal blade mounted on a base at working height above the floor. The material to be cut is placed upon or across the stationary blade. A moving upper blade is attached to a pivoted arm with power applied to it as a first-class lever. Power may be supplied by a motor through a suitable

mechanical drive that usually includes a flywheel, or by a hydraulic ram with control valves.

The mechanically driven shears provide continuous operation only; the hydraulically actuated shears may be set for continuous operation or may be controlled by the operator to provide for single stroke, reversing, and inching operations. Small alligator shears of the hydraulic type are usually hand fed and can be used as "metal cleaners" in such operations as cracking valve castings to permit separation of dissimilar metal components. Other small metal assemblies are similarly treated."

The ANSI Standard places the responsibility to meet these requirements on the manufacturer of the equipment.

"3.1 Mechanical Design Responsibility

3.1.1 Manufacture. It shall be the responsibility of the manufacturer of new equipment to design it in accordance with the requirements of this standard."

The ANSI Standard also addresses safeguards and addresses such topics as personnel instruction and manufacturer's responsibility.

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"4.1 General

4.1.1 Personnel Instruction. The employer shall train and instruct the operator and auxiliary personnel in the safe operation of the equipment to which they are assigned before starting operation. The employer shall determine by adequate supervision that correct operating procedures are being followed.

4.1.8 Manufacturer's Responsibilities. It shall be the responsibility of the manufacturer to furnish instructions with his equipment which will serve as reliable guidelines for its use and care.

Added safety devices or other improvements to equipment developed by the manufacturer shall be called to the attention of, and made available to, the owners and operators of such equipment. Retrofit of such devices shall be accompanied by suitable operational instruction changes."

The ANSI Standards specifically require a guard be provided at the point of operation to prevent the operator from inserting his hands into the area of operation. The Standard refers the reader to the Appendix, which gives further detail of this guard.

"4.3.1 Guard. A guard shall be provided at the point of operation to prevent the operator from inserting his hands into the area of operation (see Appendix)."

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A copy of the Appendix is for the point of operation guards is contained among the EXHIBITS to this report. In particular, Item A3 titled "Construction" states that the guard shall be wide enough to keep the operator's hands out of the point of operation.

"A3. Construction

Two uprights of 1-inch steel rod are welded to bases of 3/8-inch flat stock about 1-1/2 x 3-1/2 inches bent to conform to the trunnion support or base casting, and secured at the base by screws or bolts in tapped holes. An enclosure guard of 5/16-inch rod is bent and welded as shown in Fig. A1 with spacing between rods of 1 inch or less. The guard shall be high enough to clear the moving arm by at least 1 inch and wide enough to keep the operator's hands out of the point of operation. The two rear uprights of the cage are of pipe or heavy walled tubing whose internal diameter is a loose slide fit over the 1-inch supports. The tubes are tapped 1/4 X 20 inches for thumbscrews about 1-1/2 inches from each end to permit adjustment of the height of the guard. If the shear is used for cutting scrap thicker than 1/2 inch, a heavier gage rod should be used to construct the guard enclosure. Expanded metal may be used in place of the rods, or over them."

The ANSI Standard also addresses protective apparel and accessories and indicates that the operator

is required to wear protective gloves. Mr. Nicastro was wearing gloves at the time of this accident. He indicated at the time of the inspection that he has always worn gloves in operating any of the machines in the shop.

> "4.3.2 Protective Apparel and Accessories. The operator of the alligator shears and his assistant(s) shall be required to wear protective goggles or an approved type of face shield. They shall also be required to wear a leather or the equivalent apron extending to their shoe-tops, or an apron and protective leggings, as well as the universally required gloves, hard hat, and had-toe shoes."

The ANSI Standard also addresses other safeguards such as hand tools, foot controls and supplementary controls.

> "4.3.3 Hand Tools. Feeding of individual small parts to alligator shears during a "metal-cleaning" operation shall, whenever feasible, be accomplished by using pliers or other suitable holders to grasp the parts."

> 4.3.4 Foot Control. The foot switch shall be spring-loaded to return to the "stop" position when the operator's foot pressure is removed. The pedal shall have a protective guard to prevent accidental operation by falling objects or someone accidentally stepping on it.

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> 4.3.5 Supplementary Controls. Supplementary hand switches shall be located within reach of the operator and helper. When these controls are utilized for an emergency stop of the equipment, or for any other reason, they shall require resetting to the "go" position before the foot switch is activated."

The pieces Mr. Nicastro were cutting at about the time of this accident were three feet (3') to four feet (4') in length and were not the type that were so small to require a hand tool. He had the machine on the automatic control and the control box was located within the operator's positional reach. However, this accident did not occur during the operation of the machine, but during the time when Mr. Nicastro was bending down to pick up a piece of metal to be sheared in the machine. It is at this time that the guard provoked the contact with the blade.

The Occupational Safety and Health Administration (OSHA) Safety and Health Standard 29 CFR 1910 for General Industry addresses machinery and machine guarding in Subpart 0 defines the point of operation as follows.

> "§ 1910.211 Definitions.
>
> (1) "Point of operations" means that point at which cutting, shaping, boring, or forming is accomplished upon the stock."

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This same section also defines the term guard.

> "(32) "Guard" means a barrier that prevents entry of the operator's hands or fingers into the point of operation."

The Regulations also define the fixed barrier guard, the inter-locked barrier guard and the adjustable barrier guard.

> "(34) "Fixed barrier guard" means a die space barrier attached to the press frame.
>
> (35) "Interlocked press barrier guard" means a barrier attached to the press frame and interlocked so that the press stroke cannot be started normally unless the guard itself, or its hinged or movable sections, enclose the point of operation.
>
> (36) "Adjustable barrier guard" means a barrier requiring adjustment for each job or die setup."

This same section also defines the term point of operation.

> "(45) "Point of operation" means the area of the press where material is actually positioned and work is being performed during any process such as shearing, punching, forming, or assembling."

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The general machinery requirements contained in the OSHA Regulations include guards to protect the operator and other employees from coming in contact with the point of operation.

> "§ 1910.212 General requirements for all machines.
>
> (a) *Machine guarding*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.
>
> (2) *General requirements for machine guards.* Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.
>
> (3) *Point of operating guarding.* (i) Point of operation is the area on a machine where work is actually performed upon the material being processed.
>
> (ii) The point of operation of machines whose operation exposes an employee to injury, shall

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be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

(iii) Special handtools for placing and removing materials shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided."

The National Safety Council in its "Accident Prevention Manual for Industrial Operations" addresses point of operation guards. It defines guarding as follows.

"GUARDING. Any means of effectively preventing personnel from coming in contact with the moving parts of machinery or equipment which could cause physical harm to the personnel. When discussing power press guarding, the word "guard" is used exclusively for referring to barriers designed for safeguarding at the point of operation. Therefore, the word "safeguard" should be used for a barrier or cover that protects other danger zones."

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The National Safety Council also defines the point of operation.

> "POINT OF OPERATION. That area on a machine where material is positioned for processing or change by the machine."

The National Safety Council recognizes that small openings in a guard may not allow the operator to process materials and therefore the opening must be made larger. When the opening is made larger to accommodate the material being processed, the point of operation must be moved farther from the guarded point. Contained among the EXHIBITS to this report is a section of the text from the National Safety Council on guard openings which discusses the length of the point of operation from the point of access and the vertical opening of the guard. The manufacturer, McIntyre, failed to incorporate in its design a safe distance between the guard opening and the shearing blade.

The American Society of Mechanical Engineers in its text "An Instructional Aid for Occupational Safety and Health in Mechanical Engineering Design" addresses the six basic guidelines that a designer must employ in designing a safe machine. They include the elimination of the hazard, control of the hazard, the training of personnel, warning of the machine and protective equipment.

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1. "Eliminate the hazard from the product or process by altering its design, material, usage, or maintenance method.

2. Control the hazard by capturing, enclosing or guarding it at its source.

3. Train personnel to be aware of the hazard and to follow safe procedures to avoid it.

4. Provide adequate warnings and instructions in appropriate forms and locations.

5. Anticipate common areas and methods of abuse and take steps to eliminate or minimize the consequences associated with such actions.

6. Provide personal protective equipment to shield personnel against the hazard."

The American Society of Mechanical Engineers recommends that the designer realize the equipment designed and manufactured will ultimately be used by human beings; separate groups—the workers who build the machine, the personnel who service the machine and the people who operate the machine.

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"II. PRINCIPLES OF HAZARD RECOGNITON AND CONTROL

A. Appreciating the Capabilities and Limitations of Involved Groups.

At the outset, designers must realize that the equipment or products they are helping create will ultimately be used by human beings. These people vary considerably in both physical and mental abilities. Both products and manufacturing processes have some unavoidable degree of hazard associated with them. One of the first steps for the safety conscious designer to take, therefore, is to identify all of the major hazards which may apply. This constitutes the initial line of defense in their control and minimization. There are a number of identification techniques which have developed and these are discussed in detail by Marshall, Hammer and others.

A designer has to consider three separate groups of people, each of which pose different safety concerns:

1. Workers who will build the product.

2. Service personnel who will install and maintain the equipment and when necessary, repair it or do preventive maintenance.

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3. People who will operate the equipment."

The American Society of Mechanical Engineers recommends that in designing and manufacturing a machine an evaluation process must be undertaken which describes how the machine will be used, the environment in which it will be used and the population that uses the machine.

"C. Evaluating a Design for Safety and Health

Products and systems must be designed not only to function as intended, but also to either continue working or shut off safely when used in reasonably foreseeable alternative ways. This requirement means that engineering analyses must be made in the design/development cycle to determine the forms of misuse, abuse or component failure to which the product could be subjected. Such tests often include laboratory simulations with typical users and models or prototypes of the products. It could also include broader based user surveys of similar products already on the market. The evaluation process should encompass the following seven step approach to ensure that a reasonably safe design will eventually emerge.

1. Describe how the product will be used.

2. Identify the environments where it could be used.

3. Describe the user population..."

The American Society of Mechanical Engineers also gives a machinery safety checklist for designers. The first item on this checklist asks the designer if it is possible to gain access to the point of operation while the power is on.

> "Machinery Safety Checklist for Designers
>
> 1. Is the machine designed so that it is impossible to gain access to the point of operation (or any other hazard point) while the power is on?"

The American Society of Mechanical Engineers recognizes the importance of preventing access to the point of operation and lists this as the first consideration in its checklist.

CONCLUSIONS

It is my opinion, to a reasonable degree of engineering certainty, based upon an examination of the subject J. McIntyre 640 Shear machine and an interview of Robert Nicastro, that:

1. The subject machine was in a hazardous and dangerous condition.

2. The hazardous and dangerous condition consisted of a guard that provided access to the point of operation by the machine operator.

3. The guard on this machine was not sufficient or adequate for its intended purpose.

4. The guard on this machine did not meet the American National Standard Institute requirements for protecting a point of operation on a shearing machine or the Regulations from the Occupational Safety and Health Administration.

5. The guarding on this machine also did not conform with the recognized guidelines published by the National Safety Council and the American Society of Mechanical Engineers for protecting machine operators from the point of operation.

6. The vertical opening of eight and three-eighth inches (8-3/8") below this guard and to the shearing blade required a wide guard so that the operator could not extend his or her arm and hand into the shearing blade.

7. The McIntyre 640 Shearing Machine with the guard as designed, manufactured and provided by McIntyre created a hazard and danger for the machine operator.

8. The hazard and danger of this machine caused this accident.

I reserve the right to supplement my opinion should any further information regarding this accident be supplied.

Wayne F. Nolte, Ph.D., P.E.
Professional Engineer
N.J. Lic. No. 26362
WFN/bg

APPENDIX S — CERTIFICATION OF FRANK CURCIO, OWNER OF CURCIO SCRAP METAL, INC., DATED FEBRUARY 20, 2004

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION

Docket No.: L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names), i/j/s/a,

Defendants.

CERTIFICATION OF FRANK CURCIO

Frank Curcio, of full age, hereby certifies as follows:

1. I am Frank Curcio, the owner of Curcio Scrap Metal, and employer of Robert Nicastro at the time of his accident with the shearing machine.

2. I first heard of this machine while attending an Institute of Scrap Metal Industries convention in Las Vegas in 1994 or 1995, where McIntyre Machinery was an exhibitor. From their booth exhibit, I understood that the shearing machine was manufactured in England, and distributed throughout the United States through their sole US distributor, McIntyre Machinery America.

3. My son, Michael Curcio, ordered the machine from McIntyre Machinery America in Ohio, which held itself out to be "America's Link to Quality Metal processing equipment" from England. See Invoice, attached hereto as Exhibit "A".

4. Additionally, the documentation which came with the invoice provides J. McIntyre Machinery Ltd.'s address in England, along with its phone and fax number. See Documentation, attached hereto as Exibit "B". Therefore, had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts.

5. The instruction manual which came with the machine merely has a "McIntyre Machinery America" address sticker covering half of the J. McIntyre Machinery Ltd. address in England printed on the front cover. See Cover of Instruction Manual, attached hereto as Exhibit "C".

6. The instruction manual itself is printed in Britain, because British spelling is used throughout. Page 8 of the instruction manual, attached hereto as Exhibit "D",

also states that the owner and operators of the machine must make themselves aware of both UK *and* USA standards for the use of Scrap Metal Processing; therefore, J. McIntyre Machinery expected their 640 shearer machine to be used in the United States and it was sold to my New Jersey Company by McIntyre's sole American distributor with the knowledge that the machine was to be used in New Jersey.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/
Frank Curcio

Dated: 2/20/04

APPENDIX T — DEFENDANT'S NOTICE OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION, DATED SEPTEMBER 8, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD.;
J. McINTYRE MACHINERY LTD.; JOHN DOES
1-10 (fictitious names), and XYZ CORPORATIONS
1-10 (fictitious names),

Defendants.

NOTICE OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION

TO: Alexander W. Ross, Jr., Esquire
Rakoski & Ross, P.C.
76 East Main Street
Marlton, New Jersey 08053

Attorneys for Plaintiffs

Appendix T

SIR:

PLEASE TAKE NOTICE, that on Friday, October 20, 2006 at 9:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for Defendant J. McIntyre Machinery Ltd., shall make application to the Superior Court of New Jersey, Law Division, Bergen County, at the Court House, 10 Main Street, Hackensack, New Jersey, for an Order of the Court dismissing plaintiffs' Complaint for lack of personal jurisdiction pursuant to *R.* 4:6-2(b);

PLEASE TAKE FURTHER NOTICE that Defendant will rely upon the Certification of Counsel, Certification of Sally Johnson and Brief annexed hereto in support of this motion;

PLEASE TAKE FURTHER NOTICE that pursuant to *R.* 1:6-2, an original and two copies of the proposed form of Order are annexed hereto;

PLEASE TAKE FURTHER NOTICE that the Defendant requests oral argument if opposition is presented hereto.

Dated: September 8, 2006

/s/
Steven F. Gooby
DLA PIPER US LLP
379 Thornall Street, 8th Floor
P.O. Box 2940
Edison, New Jersey 08837-2226

Attorneys for Defendant
J. McIntyre Machinery, Ltd.

APPENDIX U — CERTIFICATION OF SALLY JOHNSON IN SUPPORT OF J. McINTYRE MACHINERY LTD.'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION, DATED SEPTEMBER 7, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

MCINTYRE MACHINERY AMERICA, LTD.;
J. MCINTYRE MACHINERY LTD.; JOHN DOES
1-10 (fictitious names), and XYZ CORPORATIONS
1-10 (fictitious names),

Defendants.

CERTIFICATION OF SALLY JOHNSON IN SUPPORT OF J. MCINTYRE MACHINERY LTD'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Appendix U

I, Sally Johnson, hereby certify the following facts:

1. I am the former Managing Director of J. McIntyre Machinery, Ltd, a defendant named in the above-captioned case. As such, I am fully familiar with the facts certified herein.

2. J. McIntyre Machinery, Ltd is a corporation organized and existing under the laws of the United Kingdom. Its principal place of business is in Nottingham, England.

3. Prior to October 2003, J. McIntyre Machinery, Ltd's business included the manufacture of industrial shear machines for use in scrap metal recycling.

4. In October 2003, J. McIntyre Machinery Ltd was divided into two separate business entities - J. McIntyre Machinery Ltd and JMC Recycling Systems Ltd. The manufacture of shear machines was continued by JMC Recycling Systems Ltd, also a U.K. corporation with its principal places of business in Nottingham, England.

5. To avoid confusion, in this Certification I collectively refer to J. McIntyre Machinery Ltd (pre October 2003) and JMC Recycling Systems Ltd (post October 2003) as "McIntyre."

6. I have reviewed the complaint in this action which alleges that a workplace accident involving Robert Nicastro occurred in October, 2001 at Curcio Scrap Metal in Saddle Brook, New Jersey, and that a McIntyre

shear machine was involved in the accident.

7. Based upon information provided to date, it appears that McIntyre manufactured the allegedly involved shearing machine in 1995. If McIntyre made the subject machine, it would have been manufactured in Nottingham, England and shipped to a company called McIntyre Machinery America, Ltd. ("MMA") in Stow, Ohio. However, McIntyre cannot be certain it manufactured the machine in question because McIntyre recently learned that MMA may have copied the designs of certain McIntyre products and sold them in the United States without McIntyre's knowledge.

8. McIntyre is not, and never was, affiliated with MMA. McIntyre is not and never was a corporate parent, subsidiary or affiliate of MMA. Conversely, MMA is not and never was a parent, subsidiary, or affiliate of McIntyre. MMA is an entirely separate business entity and does not, and never has, shared either common owners, managers or employees with McIntyre.

9. Based on the allegations of the complaint that the subject McIntyre shear machine was in use at Curcio Scrap Metal in Saddle Brook, New Jersey in October 2001, it appears that sometime between 1995 and 2001 MMA must have re-sold the subject machine to Curcio, or sold the machine to another entity, which in turn sold it to Curcio.

10. McIntyre had no knowledge of the business dealings between MMA and its customers, including

Curcio, concerning the at-issue shear. McIntyre does not track shipments of its products past those it makes to its own customers -in this case MMA in Stow, Ohio. Moreover, McIntyre does not and did not know who MMA's customers were. McIntyre requested MMA's list of customers several years ago, but MMA refused to provide it.

11. McIntyre did not ship or otherwise transfer the subject machine from Ohio to New Jersey, nor was McIntyre in any way involved or knowledgeable of such a transaction.

12. McIntyre had no written contract or agreement with MMA other than the invoices that accompanied the McIntyre products purchased by MMA.

13. As of 2002, MMA stopped buying McIntyre shearing machines. At present, MMA owes McIntyre in excess of $130,000 for products McIntyre sold and delivered to MMA, but for which MMA never paid McIntyre.

14. McIntyre does not directly market, sell or solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. McIntyre does not, and never did, employ a sales staff in or for the United States.

15. McIntyre does not, and never did, provide maintenance or repair services for its products to businesses or individuals in New Jersey.

Appendix U

16. McIntyre owns no property in New Jersey. It does not maintain an office or conduct any business in New Jersey. McIntyre does not have a telephone number or a telephone directory listing in New Jersey.

17. McIntyre has no employees, officers, or agents located in New Jersey or doing business in New Jersey.

18. McIntyre generates no revenues from and pays no taxes in New Jersey.

19. McIntyre does not maintain a bank account in New Jersey.

20. McIntyre has never had a license to do business in New Jersey.

21. McIntyre does not have a registered agent in New Jersey.

22. McIntyre has never sent an employee or representative to any industry trade show, event or conference in New Jersey.

23. Although it maintains an internet website, McIntyre does not solicit sales or provide a means for residents of New Jersey - or any other state in the United States - to purchase McIntyre products through its website. To date, McIntyre has not knowingly received or responded to any requests for information about its products through its website or electronic mail

from any business or individual located in New Jersey, with the exception of an electronic mail message sent by plaintiffs' counsel in this matter before the complaint was served.

I certify that the foregoing statements made by me are true. I am aware that if any statement made by me is willfully false, that I am subject to punishment.

Dated: September 7, 2006

/s/
Sally Johnson

APPENDIX V — CERTIFICATION OF STEVEN F. GOOBY, ESQ. IN SUPPORT OF MOTION TO DISMISS, DATED SEPTEMBER 7, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD.;
J. McINTYRE MACHINERY LTD.; JOHN DOES
1-10 (fictitious names), and XYZ CORPORATIONS
1-10 (fictitious names),

Defendants.

CERTIFICATION OF COUNSEL IN SUPPORT OF MOTION TO DISMISS

STEVEN F. GOOBY, of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and Of Counsel to the law firm of DLA Piper US LLP, attorneys for Defendant J. McIntyre Machinery, Ltd. ("McIntyre"). As such, I am fully familiar with the facts and circumstances surrounding the within application.

Appendix V

2. I make this certification in support of McIntyre's Motion to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction.

3. Attached as Exhibit A is a true and correct copy of the Plaintiffs' complaint filed on September 17, 2003.

4. Attached as Exhibit B is a true and correct copy of McIntyre's Answer to Plaintiffs' Complaint filed on December 22, 2003.

5. Attached as Exhibit C is the March 5, 2004 transcript of oral argument before the Honorable Elijah L. Miller, J.S.C. and the Court's ruling on McIntyre's original motion to dismiss for lack of personal jurisdiction.

6. Attached as Exhibit D a true and correct copy of Judge Miller's Memorandum of Decision of Motion.

7. Attached as Exhibit E is a true and correct copy of the Order dated March 5, 2004 granting McIntyre's Motion to Dismiss.

8. Attached as Exhibit F is a true and correct copy of the Appellate Division's Decision and Order dated May 26, 2005.

9. Attached as Exhibit G is a true and correct copy of Docket Report for the bankruptcy case of debtor McIntyre Machinery America Ltd., Inc., United States Bankruptcy Court, Northern District of Ohio (Akron), Case No. 01-54707 (the "MMA Bankruptcy").

Appendix V

10. Attached as Exhibit H is a true and correct copy of the February 7, 2003 Report of Trustee in No-Asset Case in the MMA Bankruptcy.

11. Attached as Exhibit I is a true and correct copy of the July 23, 2003 Final Decree in the MMA Bankruptcy.

12. Attached as Exhibit J is a true and correct copy of the Creditors list in the MMA Bankruptcy.

13. Attached as Exhibit K is a true and correct copy of an MMA invoice dated August 25, 1995 that reflects the purchase and sale of a shear machine by MMA to Curcio Scrap Metal.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 7, 2006

/s/
Steven F. Gooby
DLA PIPER US LLP
Attorneys for Defendant
J. McIntyre Machinery, Ltd.

APPENDIX W — EXHIBIT G TO CERTIFICATION OF STEVEN F. GOOBY, ESQ. IN SUPPORT OF MOTION TO DISMISS, DATED SEPTEMBER 7, 2006: PACER DOCKET REPORT FOR THE BANKRUPTCY CASE OF DEBTOR McINTYRE MACHINERY AMERICAN LTD., INC., UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF OHIO (AKRON), CASE NO. 01-54707 (THE "MMA BANKRUPTCY")

U.S. Bankruptcy Court
Northern District of Ohio (Akron)
Bankruptcy Petition #: 01-54707-mss

Assigned to: JUDGE MARILYN SHEA-STONUM
Chapter 7
Voluntary
No asset

Date Filed: 11/29/2001
Date Terminated: 07/23/2003

Debtor
McIntyre Machinery America Ltd., Inc.
895 Hampshire Rd
#G
Stow, OH 44224
Tax id: 34-1789303

represented by **Christopher J Niekamp**
23 S Main St
#301
Akron, OH 44308
(330) 434-1000
Email: cjn@b-wlaw.com

Appendix W

Trustee
Harold A Corzin
304 N Cleveland-Massillon Rd
Commonwealth Square
Akron, OH 44333
(330) 670-0770

Filing Date & Docket Text

11/29/2001
1 Chapter 7 Voluntary Petition. Receipt Number 55537, Fee Amount $200. Filed by McIntyre Machinery America Ltd., Inc. (pdemp, crt) (Entered: 11/29/2001)

12/03/2001
Harold A Corzin added to case (cbeog, crt) (Entered: 12/03/2001)

12/03/2001
Meeting of Creditors. 341 (a) meeting to be held on 1/28/2002 at 09:30 AM at First Energy Building. (cbeog, crt) (Entered: 12/03/2001)

12/05/2001
2 Notice of 341 Meeting of Creditors w/ BNC Certificate of Service Service Date 12/05/01. (Admin.) (Entered: 12/06/2001)

02/05/2002
3 Meeting of Creditors Held on 01/28/02 And Continued For 02/11/02 At 11:30 A.M. (cbeog, crt) (Entered: 02/08/2002)

Appendix W

02/05/2002
Meeting of Creditors Continued. 341 (a) meeting to be held on 2/11/2002 at 11:30 AM at First Energy Building. (cbeog, crt) (Entered: 02/08/2002)

02/12/2002
4 Amended Schedules "B" Filed by McIntyre Machinery America Ltd., Inc. (CC: Trustee) (cbeog, crt) Modified on 2/13/2002 (cbeog,). (Entered: 02/13/2002)

02/13/2003
5 Trustee's No Asset Report. (cbeog, crt) (Entered: 02/14/2003)

02/13/2003
6 Meeting of Creditors Held. (HELD ON 03/18/02) (cbeog, crt) (Entered: 02/14/2003)

07/23/2003
7 Final Decree Administered. (cbeog, crt) Additional attachment(s) added on 7/23/2003 (cbeog,). (Entered: 07/23/2003)

07/23/2003
Bankruptcy Case Closed. (cbeog, crt) (Entered: 07/23/2003)

APPENDIX X — EXHIBIT I TO CERTIFICATION OF STEVEN F. GOOBY, ESQ. IN SUPPORT OF MOTION TO DISMISS, DATED SEPTEMBER 7, 2006: FINAL DECREE IN THE MMA BANKRUPTCY, DATED JULY 23, 2003

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

CASE NO: 01-54707-mss
CHAPTER: 7

SSN/TAX ID:

DEBTOR: McIntyre Machinery America Ltd., Inc.

CO-DEBTOR:

FINAL DECREE

THE COURT, IN RELIANCE UPON THE CERTIFICATION OF THE UNITED STATES TRUSTEE, FINDS THAT THE ESTATE OF THE WITHIN DEBTOR(S) HAS BEEN FULLY ADMINISTERED.

THE DEPOSIT REQUIRED BY THE PLAN HAS BEEN DISTRIBUTED.

IT IS THEREFORE ORDERED THAT:

Appendix X

_X_ Harold Corzin IS HEREBY DISCHARGED AS TRUSTEE OF THE ESTATE OF THE ABOVE-NAMED DEBTOR AND ANY BOND REQUIRED PURSUANT TO 11 U.S.C. SECTION 322 IS CANCELLED.

_X_ THE CHAPTER 7 CASE OF THE ABOVE-NAMED DEBTOR(S) IS CLOSED; AND

OTHER PROVISION AS NEEDED.

DATED: 7/23/2003 /s/
BANKRUPTCY JUDGE

APPENDIX Y — DEFENDANT J. McINTYRE MACHINERY LTD.'S RESPONSE TO PLAINTIFF'S FIRST SET OF JURISDICTIONAL INTERROGATORIES, DATED SEPTEMBER 30, 2005

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-6857-03

Civil Action

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD.; J. McINTYRE MACHINERY LTD.; JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

J. McINTYRE MACHINERY LTD.'S RESPONSE TO PLAINTIFF'S FIRST SET OF JURISDICTIONAL INTERROGATORIES

J. McIntyre Machinery Ltd.'s ("JMM") response to plaintiffs' First Set of Jurisdictional Interrogatories, all in accordance with the applicable orders of the Superior

Court of New Jersey, Appellate Division and Law Division, follows. By providing this response, JMM does not acknowledge, accept, or submit to the jurisdiction of any New Jersey court and specifically reserves all rights to continue to challenge any assertion of personal jurisdiction of this Court over JMM.

GENERAL OBJECTIONS

1. JMM objects to producing confidential, proprietary, competitively sensitive and/or trade secret materials or information without an appropriate protective order assuring that such documents and information will be used solely for purposes of this litigation and will not be disclosed to non-parties.

2. JMM objects to any individual Interrogatory to the extent that the request may be construed to seek information or documents protected by the attorney-client privilege, the attorney work product doctrine, the consulting expert exemption, the exemption protecting communications passing between agents of a party conducting an investigation in connection with litigation, or any other applicable privilege or exemption from discovery under New Jersey law.

3. JMM objects to the Interrogatories to the extent that compliance therewith would require JMM to undertake an unduly burdensome, expensive, or time-consuming search for documents or information.

4. JMM objects to the Interrogatories to the extent that they seek responses relating to time periods outside of the time period relevant to this litigation.

5. JMM objects to the Interrogatories to the extent they purport to require answers from, for, on behalf of, or relating to, any person or entity other than JMM.

6. JMM objects to the Interrogatories to the extent they require JMM to create any document that would otherwise not exist.

ANSWERS TO JURISDICTIONAL INTERROGATORIES

1. Set forth the name, job position, and address of each and every employee, partner or shareholder of J. McIntyre Machinery Ltd. who directed marketing and distribution of J. McIntyre Machinery Ltd. products to the United States, from 1994 to the present.

ANSWER:

Objection. This interrogatory is ambiguous and vague as to the term "directed" and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, no employee, partner, director or shareholder of JMM ever "directed" any form of marketing of JMM products to the United States. JMM provided copies of product information materials to McIntyre Machinery America, Ltd. ("MMA") that JMM used in the United Kingdom, which were altered to reflect MMA' s name and contact information in place

of JMM's contact information. In addition, no JMM personnel were involved in "directing" distribution of JMM products to the United States. MMA purchased JMM products by first sending JMM a purchase order either by facsimile or telephone. The copies of invoices produced with JMM's response to plaintiffs' request for production of documents reflect JMM's sales to MMA during the time period indicated.

2. List all customers, including warranty customers, known to J. McIntyre Machinery, Ltd., its subsidiaries or its exclusive distributors, located in the State of New Jersey.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous, vague, not limited in time, lacks foundation, and is not reasonably calculated to lead to the discovery of admissible evidence. JMM also objects to this interrogatory to the extent it calls for JMM to respond on behalf of its "exclusive distributors" (which JMM presumes to include only those in the United States), which are or were unaffiliated United States companies. Without waiving these objections, JMM has no customers located in the State of New Jersey. JMM further responds that all product warranties were issued and handled solely by MMA; JMM did not warrant its products to MMA's customers.

3. List all trade shows, conventions or conferences in the United States in which J. McIntyre Machinery Ltd. or McIntyre Machinery America Ltd. has

participated from 1991 until the present. Provide the names of all J. McIntyre Machinery Ltd. employees, servants or agents who attended such shows.

ANSWER:

Objection. This interrogatory is overly broad, unduly burdensome, not sufficiently limited in time, ambiguous and vague as to the term "participated," and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, JMM personnel attended the Institute of Scrap Recycling ("ISRI") annual conventions, which were held in Las Vegas, Nevada and other U.S. cities, as the guests of MMA. The JMM personnel who variously attended the ISRI convention were Mrs. Sally Johnson; Mr. Philip Pownall; Mr. David Pownall; Mr. Michael Pownall; and Mr. Mike Willshaw. No JMM personnel ever attended a convention in the State of New Jersey.

4. Identify each J. McIntyre Machinery Ltd. company or subsidiary whose products are, directly or indirectly, marketed or sold in the State of New Jersey.

ANSWER:

JMM objects to this interrogatory on the grounds that the term "indirectly" is ambiguous and vague and that it is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, JMM did not market or sell products in the State of New Jersey.

5. Identify each J. McIntyre Machinery Ltd. company, subsidiary or exclusive distributor that has provided and/or sold goods or services to a buyer in the State of New Jersey.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous, vague, not limited in time, and not reasonably calculated to lead to the discovery of admissible evidence. JMM also objects to this interrogatory to the extent it calls for JMM to respond on behalf of its "exclusive distributors" (which JMM presumes to include only those in the United States), which are or were unaffiliated United States companies. Without waiving these objections, JMM has never sold goods or provided services in the State of New Jersey.

6. For each company, subsidiary or exclusive distributor identified in your answer to Interrogatory No.4, describe the goods or services provided and/or sold and attach copies of all documents regarding such sales, including but not limited to, invoices, statements, warranty registration, shipping documents, or receipts.

ANSWER:

See response to Interrogatory number 4. JMM does not market or sell its products in the State of New Jersey. However, see copies of invoices produced with JMM's response to plaintiffs' request for production of documents that reflect JMM's sales to MMA in Stow, Ohio during the time period indicated.

Appendix Y

7. Describe all services or goods provided by J. McIntyre Machinery Ltd. to any J. McIntyre Machinery Ltd. subsidiary identified in your answer to Interrogatory No.4.

ANSWER:

Not applicable.

8. Describe all policies or procedures by which J. McIntyre Machinery Ltd. companies or subsidiaries, directly or indirectly, access funds from all debt instruments to which J. McIntyre Machinery Ltd. is a signatory.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous, vague, vexatious, harassing, and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory is also palpably improper because it lacks any foundation and appears to seek confidential financial information about a United Kingdom company that is wholly unrelated and not probative of a determination of whether that company is subject to personal jurisdiction in the State of New Jersey.

9. Describe every account in your financial cost accounting system that reflects the allocation of expenses incurred in connection with the provision of each service described in your answer to Interrogatory No.8.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous, vague, vexatious, harassing, and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory is also palpably improper because it lacks any foundation and appears to seek confidential financial information about a United Kingdom company that is wholly unrelated and not probative of a determination of whether that company is subject to personal jurisdiction in the State of New Jersey.

10. Describe all types of intercompany transfers from J. McIntyre Machinery Ltd. subsidiaries to J. McIntyre Machinery Ltd.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous and vague as the term "intercompany transfers," and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, none.

11. Describe all accounts in your financial cost accounting system that reflect each type of intercompany transfer from J. McIntyre Machinery Ltd. subsidiaries to J. McIntyre Machinery Ltd. identified in your answer to Interrogatory No. 10.

ANSWER:

Not applicable. See answer to Interrogatory number 10, above.

12. Identify all persons who have been signatories on each bank account maintained in the name of any J. McIntyre Machinery Ltd. subsidiary. Your answer should include, and separately identify, all persons with authority to direct that any payment from any such bank account be made on behalf of any such J. McIntyre Machinery Ltd. subsidiary.

ANSWER:

Objection. This interrogatory is overly broad, ambiguous, vague, lacking in foundation and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, none.

13. Identify and provide copies of all tax returns J. McIntyre Machinery Ltd., its subsidiaries, or any entity in which J. McIntyre Machinery Ltd. has an interest, has prepared or filed in the United States, including federal corporate income tax returns, state income tax returns, and state property tax returns.

ANSWER:

None.

Appendix Y

14. For each company or subsidiary identified in your answer to Interrogatory No. 4, describe every type of action each such subsidiary takes that requires J. McIntyre Machinery Ltd.'s approval or authorization, including a subsidiary's budget, its capital or operating expenditures, its entry into a contract or its involvement in other business transactions.

ANSWER:

Not applicable.

15. For each type of action identified in your answer to Interrogatory No. 11, identify the person at J. McIntyre Machinery Ltd. who approves or authorizes such action.

ANSWER:

Not applicable. See answer to Interrogatory number 11, above.

16. Describe all contractual obligations incurred by each J. McIntyre Ltd. subsidiary identified in your answer to Interrogatory No.1 for which J. McIntyre Ltd. is also a guarantor.

ANSWER:

Objection. This interrogatory is overly broad, unduly burdensome, ambiguous, vague, lacking in

foundation, not sufficiently limited in time, improperly calls for legal conclusions and is not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory also does not appear to have any relationship to Interrogatory No.1. Without waiving these objections, none.

17. List all investments held by J. McIntyre Machinery Ltd. in the United States and in particular, in the State of New Jersey.

ANSWER:

None.

18. Set forth any and all communications you have had, including dates and methods of communication, with individuals located in the State of New Jersey, from 1994 to the present, and provide copies of all such communication, including but not limited to, correspondence, sales brochures, telephone calls, e-mails, invoices and statements, and provide copies of such documents.

ANSWER:

JMM has no record and is unaware of any such communications with individuals located in the State of New Jersey.

19. Provide the names, job titles, and addresses of any and all of your employees, servants or agents who do business in the United States, including but not limited to sales persons and repair persons.

Appendix Y

ANSWER:

Objection. This interrogatory is overly broad, vague and ambiguous as to the phrase "who do business in the United States," improperly calls for legal conclusions as to the terms "servants" and "agents," is not sufficiently limited in time and is not reasonably calculated to lead to the discovery of admissible evidence. JMM further objects to this interrogatory to the extent it seeks information unrelated to plaintiffs' attempted assertion of personal jurisdiction in the State of New Jersey. Without waiving these objections, no employee of JMM does any "business," including sales or repairs, in the State of New Jersey or in the United States. At present, JMM sells its products to Strip-Tec in Texas.

20. Set forth all courts located in the United States in which J. McIntyre Machinery Ltd. has appeared as a party or a witness. Provide and any all documents regarding same, including Pleadings, Answers to Interrogatories, Deposition Transcripts, and other discovery responses, along with the name and addresses of attorneys representing J. McIntyre Machinery Ltd. in the United States.

ANSWER:

Objection. This interrogatory is overly broad, unduly burdensome, not sufficiently limited in time or scope, not limited to plaintiffs' attempted assertion of personal jurisdiction in the State of New Jersey, improperly seeks the production of documents that are matters of public record and equally (if not more so) available to plaintiffs than they are to JMM, and is not

reasonably calculated to lead to the discovery of admissible evidence. JMM further objects to this interrogatory to the extent it calls for disclosure of information or materials that are protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Without waiving these objections, JMM responds that it was named as a party in the following cases in the United States:

(a) *Mike Smith d/b/a Empire Recycling v. McIntyre Machinery America, Ltd., Inc., et al.*, Circuit Court of Cabell County, West Virginia, Civil Action no. 99C0326;

(b) *David B. Whitaker*, Kentucky, Civil Action no. 00-Cl-00797;

(c) *Clarence Miller v. McIntyre Machinery America*, Cook County, Illinois, Case no. 00L2745;

(d) *Richard Graham and Margaret Graham*, Massachusetts, Case no. C.A. 99-cv-10145 (PBS).

Dated: September 30, 2005

SIGNED AS TO OBJECTIONS ONLY

/s/
Steven F. Gooby
DLA PIPER RUDNICK GRAY CARY US LLP
Attorneys for J. McIntyre Machinery, Ltd.

APPENDIX Z — EXHIBIT F TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ., DATED OCTOBER 11, 2006

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY - LAW DIVISION
Docket No.: L-6857-03

CIVIL ACTION

ROBERT NICASTRO
and ROSEANN NICASTRO, h/w

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names), i/j/s/a,

Defendants.

CERTIFICATION OF ALEXANDER W. ROSS, JR., ESQ.

Appendix Z

I, ALEXANDER W. ROSS, JR., ESQUIRE, of full age, hereby certify as follows:

1. I am an attorney at law in the State of New Jersey and am representing the plaintiffs in this products liability case with catastrophic personal injuries. As such, I am fully familiar with the facts stated herein.

2. In order to obtain an address in the United States for McIntyre Machinery Ltd., I went to the website of J. McIntyre Machinery, Ltd., which provides an address of Nottingham, England, UK. See Contents of Website. attached hereto as Exhibit "G".

3. From their website, I sent them an email from my office in Marlton, New Jersey, requesting information on the name and address of an U.S. sales or distribution center. See E-mail dated October 22, 2003, attached hereto as Exhibit "H".

4. On that same day, I received an e-mail in response from J. McIntyre Machinery, advising me that they currently use "Strip Technology" in Texas for the sales of shears and balers. This e-mail also provided contact information for a Bobby Alexander in Fort Worth, Texas. See E-mail dated October 22, 2003, attached hereto as Exhibit "I".

5. Also on the same day, I received an e-mail from Bobby Alexander, stating that he is the "North and South American Representative" for J. McIntyre

Machinery. He also stated that he was contacting me at the request of J. McIntyre Machinery. See E-mail dated October 22, 2003, attached hereto as Exhibit "J".

6. The Summons and Complaint was served via certified mail on Bobby Alexander in Fort Worth, Texas, the admitted representative of J. McEntyre Machinery. Following service in Texas, defense counsel subsequently answered the Complaint on behalf of J. McIntyre Machinery, Ltd. The Complaint was subsequently served on J. McIntyre in Nottingham, England via The Hague Convention.

7. J. McIntyre Machinery is listed as an exhibitor at ISRI's 2002 Convention in Florida. See List of Exhibitors attached hereto as Exhibit "K".

I CERTIFY THAT the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

s/
ALEXANDER W. ROSS, JR.

DATED: October 11, 2006

APPENDIX AA -- EXHIBIT N TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: J. McINTYRE MACHINERY, LTD.'S RESPONSE TO PLAINTIFFS' REQUEST FOR MORE SPECIFIC ANSWERS TO JURISDICTIONAL INTERROGATORIES, DATED NOVEMBER 16, 2005

November 16, 2005

BY UPS OVERNIGHT DELIVERY

ALEXANDER W. ROSS, JR., ESQ.
RAKOSKI & ROSS, P.C.
76 East Main Street
Marlton, New Jersey 08053

Re: Nicastro v. McIntyre Machinery America, Ltd., et al.

Dear Mr. Ross:

We write in response to your letter dated October 10, 2005 (received October 18) requesting more specific answers to interrogatories and responses to document demands. We disagree with your characterization that the jurisdictional discovery responses of J. McIntyre Machinery, Ltd. ("JMM") were "woefully inadequate and unresponsive." To the contrary, JMM provided reasonable responses to the requests as presented, many of which lacked foundation, contained incorrect presumptions, or were simply not applicable. However, because your October 10 letter clarified several of the discovery requests, changed or broadened others, and since JMM located additional documents concerning

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McIntyre Machinery America ("MMA"), we respond to your letter, without waiving any previously asserted objections, as follows:

Interrogatory no. 1. This interrogatory sought the identities of JMM personnel who "directed marketing and distribution" of JMM products to the United States. Your October 10 letter more broadly seeks the identities of anyone at JMM "who dealt with MMA in any capacity whatsoever." Although this is a different question, the JMM personnel who communicated with MMA's representatives were Sally Johnson; Michael Pownall (now retired); Phillip Pownall; Mike Willshaw (retired, current address unknown); Jason Midgley (former employee, current address: 53 Foston Avenue, Burton On Trent, DE13 0PL); and possibly Geoff Trapnell (former employee who left the company in 1999, current address unknown).

Interrogatory no. 2. JMM's answer to this interrogatory was not "incorrect." First, JMM did not - and will not - respond to this interrogatory (or any other discovery request) on behalf of MMA because JMM has no standing to do so. Any request seeking MMA's knowledge or information should be directed to MMA, its successors if any, or its bankruptcy trustee. Second, MMA's customers were not JMM's customers. Third, MMA did not provide JMM with any records concerning the identity of any New Jersey customers MMA may have had or their warranty information. Fourth, while Curcio Scrap Metal may have possessed a JMM product on the date of the alleged accident, Curcio was not a customer of, or known to, JMM.

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The "intent" of this interrogatory as described in your October 10 letter differs from the plain language of the interrogatory. The original interrogatory asks for a list of all customers known to JMM and MMA that are located in New Jersey, which is quite different than a request for "the names and addresses of all companies known to JMM which have its products in the State of New Jersey." Regardless, JMM responds to the purported "intent" of this interrogatory by stating that it is unaware of the identities of any such companies, with the possible exception of Curcio Scrap Metal, which JMM learned of only through the allegations asserted by plaintiffs in the case. As stated above, Curcio was not and is not a customer of JMM, JMM never had business dealings with Curcio, and JMM lacks sufficient knowledge or information to confirm whether Curcio was a customer of MMA.

Interrogatory no. 3. JMM further responds to this interrogatory as follows: Upon information, belief and the recollections of JMM employees, the referenced JMM personnel attended the following ISRI conventions:

1990	New Orleans	Michael Pownall
1991	Las Vegas	Michael Pownall
1992	Michael Pownall attended the ISRI convention, which JMM believes, but cannot confirm, was held in either in Washington D.C. or Los Angeles	

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1993	Orlando	Michael Pownall
1994	Las Vegas	Michael Pownall
1995	Las Vegas	Michael Pownall
1996	Orlando	Michael Pownall
1997	Las Vegas	Michael Pownall
1998	San Francisco	Michael Pownall
1999	Orlando	Michael Pownall, Sally Johnson, Mike Willshaw
2000	Las Vegas	Michael Pownall, Sally Johnson, Mike Willshaw
2001	San Antonio	Michael Pownall, Sally Johnson
2002	Las Vegas	Michael Pownall, Sally Johnson
2003	Orlando	Phillip Pownall, Sally Johnson
2004	Las Vegas	Phillip Pownall, Michael Pownall
2005	New Orleans	Phillip Pownall

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In addition, JMM personnel also attended the following exhibitions and conferences:

The Minerals, Metals and Materials Society (TMS) Annual Meeting and Exhibition

1999	San Diego	David Pownall
2000	Nashville	David Pownall
2001	New Orleans	David Pownall
2002	Seattle	Harry Perry
2003	San Diego	David Pownall
2004	San Francisco	David Pownall; Jason Midgley

Aluminium USA conference

2003	Chicago	David Pownall; Jason Midgley

Aluminium Association Annual Meeting

2004	Tucson, Arizona	David Pownall; Jason Midgley
2005	Naples, Florida	David Pownall; Andy Gibbs

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National Manufacturing Week Exhibitions

2005	Chicago	David Pownall; Andy Gibbs

Interrogatory no. 4. As stated in JMM's answer to this interrogatory, JMM did not sell its products to any entity in the State of New Jersey. JMM received no information or records from MMA about any sales MMA may have made in the State of New Jersey. Requests for such information should be directed to MMA, any successor entity, or MMA's bankruptcy trustee.

Interrogatory no. 5. This interrogatory sought the identities of "each J. McIntyre Machinery Ltd. Company, subsidiary or exclusive distributor" that sold goods or services to a buyer in New Jersey. However, your letter now seeks the identity of "*any entity in the United States* that has sold JMM products to customers in the State of New Jersey," which is a different question. As stated in JMM's answer to this interrogatory, JMM did not sell JMM products to anyone in the State of New Jersey. Although MMA may have resold products it purchased from JMM to a buyer in New Jersey, JMM received no information or records from MMA about any such sales, nor does JMM have information or records concerning "any [other] entity in the United States" that may have sold a JMM product in New Jersey.

Interrogatory no. 6. JMM is unable to locate any formal purchase orders received from MMA. However, see printouts of electronic mail between representatives

of MMA and JMM produced herewith related to MMA's product orders, inventory, and other issues. See also copies of various correspondence and documents related to the business dealings between MMA and JMM. JMM has no other documents responsive to this request in its possession or control. Upon information and belief, additional documents may exist that are responsive to this request, but they would be contained in the large volume of JMM's business records that were appropriated by the receiver appointed to oversee the receivership of JMM's former parent company, Nottingham Metal Recyclers Ltd.

Interrogatory no. 7. No JMM subsidiary was identified in interrogatory no. 4. Thus, JMM stands by its "Not applicable" response to this interrogatory.

Interrogatory no. 18. With the possible exception of what we understand to have been a surreptitious e-mail from you to JMM prior to serving it with the complaint, JMM has no record of any communications with individuals located in the State of New Jersey.

Because JMM was unable to locate the original e-mail message you sent - and a printout of same was not provided with your appeal papers or otherwise - we are presently uncertain if you identified yourself in the e-mail as being from New Jersey, or if you disclosed in the e-mail that you were an attorney who had recently instituted a New Jersey lawsuit against JMM. Accordingly, we request that you immediately provide us with a printout of your e-mail to JMM (and copies of

any other written or electronic communications you or your agents may have directed at JMM).

Interrogatory no. 19. Your conclusion that JMM "did business in the United States; and specifically, in the State of New Jersey" by Mr. Pownall's response to an electronic mail message sent by you, a plaintiff's attorney who had recently instituted - but not yet served - a lawsuit against JMM, is wholly unsupported by any legal authority.

Without waiving any previously asserted objections to this interrogatory, JMM reconfirms that it does not do and has not done any business, including sales or repairs, in the State of New Jersey. However, JMM Commissioning Engineer Robin Walker has performed installation services of JMM "TARDIS" systems, which are used for rapid cooling and recovery of aluminum from aluminum dross, in the States of Virginia, Illinois, Washington, Iowa, and Kentucky.

Interrogatory no. 20. Please see enclosed copies of various non-privileged documents from the lawsuits identified in JMM's answers to interrogatories.

Request for Production of Documents

With regard to your further request for production of purchase orders, see JMM's further answer to Interrogatory no. 6, above.

Request no. 2. See further response to Interrogatory no. 3, above. JMM has never had any

"sign up" lists or similar documents from any conventions in the United States. Any requests for information by attendees at United States trade shows or conventions would have been handled directly by MMA personnel. Thus, any such information or documentation should be in the possession or control of MMA, its successors if any, or MMA's bankruptcy trustee.

Request no. 4. See further answer to Interrogatory no. 6, above.

Request no. 5. JMM stands by its response to this request. It is JMM's position that any communications or financial information concerning JMM's relationship with its current United States independent distributor in Texas is not only irrelevant to plaintiff's attempted assertion of personal jurisdiction over JMM in the State of New Jersey, but is vexatious, oppressive and improperly seeks current confidential business records, the disclosure of which could competitively harm JMM and other entities not parties to this action. Upon a showing that the materials sought in this request are relevant and with plaintiff's agreement to enter an appropriate confidentiality agreement, JMM will reconsider its response to this request.

Very truly your,
/s/
Steven F. Gooby

SFG/la
Enclosures

APPENDIX BB — EXHIBIT O TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: EMAIL FROM MARY GAITHER TO SALLY JOHNSON, DATED MAY 3, 2000

From: Mary Gaither <takeme2oz@nls.net>
To: Sally Johnson <sally.machinery-jmcintyre@btinternet.com>
Date: 03 May 2000 00:50
Subject: CONTAINER LETTER

Hi Sally,

Well, things are not looking good for the 200 customers. I will need that letter from you as soon as possible and if you have some 200 blades on hand it would be a good idea if you put them in the container to us, as we are going to need them if we are going to save 3 of these deals. It is really a shame that this had to happen. I understand that it was not intentional on your part, but this customer ass kissing stuff really stinks! Needless to say the boys were pretty upset with the whole situation. I understand what you said about wanting your employees to be protective for your company, but we need to make sure between the two of us that this kind of thing never ever happens again. Please let me know where you would like the money wired to if you have changed over to your new bank.

Also, we REALLY need some more literature for the shears. This new sales guy of mine is really shaking things up! You and I will need to discuss the contents of another container very soon. I know that 200's will be a must, so you can go ahead and start making those for sure. I believe that you said it was best to build them in

lots of 5's. I will venture to say that we will want at least that many, probably more. We also need to address the pricing for the model 200's that appears on the invoice that I (finally) have received. It came over the fax on Friday about noontime. All the 320's and 407's pricing is correct as we agreed in Vegas, but the Model 200's are priced $40 higher then we agreed. Will you need to issue me a credit for these, or do you want to send over a revised invoice? Please let me know. Also, model 320's sales seem to be on the rise. What is the most cost effective number of those for you to build at a time? Also, could you please give me pricing on the Trent 170's? I need to know if it is going to be worth it to sell those here in the states. As I recall, neither one of our companies was making very much on the sale of one. If that is still the case then we will have to look elsewhere for a stripper to sell until you have the time to devote to manufacturing one yourselves as opposed to going through Russell.

I received a letter regarding our payment of the two booths we reserved for the ISRI 2001 convention in San Antonio. Are we still in agreement that we do not need two booths? We all feel that one booth will be sufficient. Please let me know what your thought's are right away so Ican get a check off to ISRI before we lose the booth space that we requested. Well, that's all for now I think. Hope you had a good weekend. Talk to you soon.

Best Regards,
Mary
03/05/00

APPENDIX CC — EXHIBIT P TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: UNDATED LETTER FROM GARY AND MARY GAITHER TO MICHAEL POWNALL

Mr. Michael Pownall
J. McIntyre Machinery Ltd.
Unit G, Acorn Park Industrial Estate
Harrimans Lane
Dunkirk
Nottingham, NG7 2SD England
011-44-602-422-333
Fax: 011-44-602-862-017

Dear Michael,

This letter is in response to the conversations that we have had over the past few weeks regarding the past, present, and future relations between J. McIntyre, England and McIntyre Machinery America. We have enjoyed the friendship that we have built with you and Annette over the past 8 years. As we discussed, our present situation is the result of a number of unresolved issues on both sides. We will do our best to state our position as well as our wishes for the future here in our letter to you.

When we started our own company back in 1994, we were naive to the many aspects involved in owning a business. We have learned many things the hard way, but, believe that we are stronger because of it. We have always looked up to you and have appreciated the business knowledge that you have shared with us on numerous occasions

over the years. In short, we have been listening and we have structured our advertising and sales efforts in accordance with your direction and guidance whenever possible. We never received any monetary aid with regards to the advertising of your machinery in the states, perhaps we should have brought that point up from the beginning. That is all hindsight now.

We introduced Niagara to America in 1997, and as you are aware, that system never achieved a viable status. In your own words it is a piece of junk that you no longer wish to sell and we would do better to piece together our own system for sale in the States and elsewhere. Also at the ISRI show in Vegas in 1991 we introduced the McIntyre wire stripper. Once again we marketed and advertised a product, as well as paid to have it shipped to the show along with all the other machines for display in the booth. In the end we were unable to produce it for sale in the States. The long production time coupled with the lack of substantial monetary compensation to either one of our companies all factored in and today these machines are currently being offered for sale through our competitor, Rigby Machinery. Their "success" here in the States can not be credited to our expensive marketing and sales efforts since we upheld our loyalty to you and turned Russell down cold when he approached us directly about selling "our own" cable stripping machines. We have never understood what happened with regards to * * * even though we have inquired about the current relationship status on numerous occasions we have not heard any definitive explanations.

Appendix CC

That brings us to Tardis. We introduced Tardis to the U.S.A. in 1996 in Florida and again in 1997 and 1998 in Vegas and San Francisco respectively. As you are aware in 1996 we were all served a legal summons at the convention by Alteck naming us all in a major patent lawsuit. Our years of "Tardis Hell" began that day.

We advertised, marketed, traveled for and freighted it, or parts of it, out to 3 different conventions as well as to several demo sites, all to no avail. For whatever reasons after 4 years of advertising, marketing, traveling and enormous amounts of time spent defending ourselves against the lawsuit accusations, we again walk away without any monetary compensation for our efforts. On this point we have been constantly accused of "whining" when what we should be doing is putting the whole thing behind us and just sit back and wait patiently while our successors, Pyrotec, sell Tardis in the States. I suppose this would be much easier for us if we had never been promised that this was the machine that was going to make us all a good living it we were just willing to work hard to get it off the ground. Our company is not made up of multiple division and when Tardis sales in the States did not happen, we did not have the income generated by sales of machinery into other countries to make up the losses for us.

After exhausting ourselves and our personal bank accounts, we were left with nothing but promises of "some kind of involvement" in the future of Tardis sales and service along with a scolding for allowing ourselves to get in over our heads financially. We would NEVER

have invested the amounts of time, energy and money that we did if we had not believed that we would, in the end, be compensated for our efforts. Also we certainly would have never leased the size building that we occupy if we had not expected to handle the importing and servicing of Tardis here in the States. We did not simply imagine the promises that were made to us. It has, however, become apparent that our time of involvement with the Tardis line has long ago come to an end. The fact of the matter is that we have paid out some $350,000.00 plus in actual advertising, convention, freight and travel charges associated with the 3 afformentioned machinery lines. What sales do we have to show for it? Can you really put all the blame on us for not trying hard enough? The fact that we have stuck it out and never quit must be worth something. That dollar figure does not even take into consideration all the hours, days and months that we all were forced to dedicate to talking to various lawyers and our travel time. It also does not include machinery repairs and warranty issues that we have handled over the years without any monetary assistance from anyone. We simply believed that if we worked hard and believed in our efforts it would pay off in the end. We are tired of promises and half truths. You know that we are not dishonest people by nature. We are proud of the reputation that we are striving to build for ourselves and our company, as well as for your company.

We have taken several steps to protect ourselves in the future. We have secured our own separate liability coverage which will cover any and all machinery that we sell. We also agree with you regarding the sale of can

machines, no more should be sold in the States. There are just too many problems associated with them and Americans do not seem to be able to stop tinkering with them. Since we are locked into a long term lease for the large facility we occupy, we must come up with some type of business use to utilize this space to make it cost effective. It is ideal * * * That is how we have survived during the past year and a half since the scrap metal market took a severe nose dive. We have also taken the necessary steps to shift the ownership of our company stock in favor of Mary, thus qualifying us as a minority owned business. This point will allow us first rights as a woman owned business to all U.S. government bids that are offered. As we discussed, the Model 640 is ideal for munitions destruction. This is certainly an area which we plan to pursue.

We are open to working with you in regards to procuring, refurbishing and exporting any type of machinery that you think you can sell into the U.K. or elsewhere. We are also interested in working with you to develop new products to sell here in the States. We have established a name for ourselves in the States that both of our companies can benefit from if we can find the means to put our relationship back on the right track. We would be most interested in coming together in a joint venture to design and manufacture a wire stripper here in the States. There certainly is a need for a reliable and well made wire stripper here in the States. With regards to your existing machinery line, we are willing to discuss an arrangement where as we would pre-pay all future machinery containers. We are currently paying

for parts up front prior to shipment to us via credit card. We also have the 2 booths at the ISRI convention to consider. We have already placed full page ads in both Scrap and Recycling Today advertising the full line of McIntyre Machinery.

The only real question left is can this relationship be saved? We have done our best to state our position to you here in this correspondence. We hope that we have been successful and that after careful consideration to all items stated you will grant us a fair and honest reply.

Very best regards,

/s/
Gary & Mary Gaither

APPENDIX DD — EXHIBIT Q TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: EMAIL FROM SALLY JOHNSON TO MARY GAITHER, DATED APRIL 26, 1999

From: Sally Johnson <sally.machinery@jmcintyre.btinternet.com>
To: takeme2oz@nls.net <takeme2oz@nls.net>
Date: 26 April 1999 14:54
Subject: Re: REPLY Re: Bank transfer

Hi Mary

Thanks for your message - but no, we haven't received the Timco money yet. I seem to remember waiting about six months for it last time! Thanks for the invoice which can now be processed through our books.

I've had the meeting with the loss adjuster who now has all the information relevant to the claim, including the last fax from Mark Bemlohr. He will now be recommending that the lawyers go ahead and fight the case. The 320 shear is covered by our product liability insurance - so if the 320 is found to be in any way defective, then the buck will pass through Alan Ross to yourselves and down to us and our insurers will of course pay out.

However, since McIntyre America and Alan Ross have been sited separately, it is very important that you as individual companies respond to the action on your own behalves. Our insurance does not, for example, cover any alterations you or Alan Ross might make to the

machines once they leave our works - or any comments you might make in the course of the transaction with the customer which may, for example, imply that a 320 shear could be used for cutting up a piece of bakelite, say, which then shatters and pokes someone in the eye. This would have to be covered by your own insurance. At this stage, basically, noone knows what is going off and liability has to be established. If for any reason McIntyre America, or Alan Ross, are found liable due to any action they might have taken - which is highly unlikely - then our insurance will of course not cover it. The likely course is that Alan Ross will say, McIntyre America sold it to me and I did nothing to change it in which case liability passes to you, who say, well we didn't do anything, the product was built and designed by McIntyre Machinery in the UK and the buck stops here - if there's something wrong with the machine. You will have to appoint your own lawyers in the States to deal with the claim and get it moving along those lines. American law - who needs it?! Hope this helps,

Regards

Sally

Appendix DD

—Original Message—

From: takeme2oz@nls.net <takeme2oz@nls.net>
To: Sally Johnson <sally.machinery-jmcintyre@btinternet.com>
Date: 23 April 1999 22:49
Subject: REPLY Re: Bank transfer

Hi Sally,

Got your e-mail. I understand what we discussed at ISRI regarding the TARDIS commissions. We realize the implications for you if we take a commission for a machine before you have been paid by the customer for it. We do not plan to collect our commissions in this fashion on an ongoing basis. In this instance, Andrew Stein stood on the booth in Orlando on Saturday, April 17th, and stated that all the work at Timco had been completed by your service tech and he stated that he would be making full payment to J McIntyre Machinery England on Monday for the TARDIS unit that came out of our facility. That is the reason why we deducted the amount from our cable transfer to you this week. We are short on cash flow from the ISRI convention expenses that we had to pay out of pocket for what, as you are aware, was a very poor show. We have never been to a show where we literally went home without any concrete leads or sales. Not your problem, I know, but a fact none the less. We have no problem waiting for you to receive payment from the customer first before requesting our commission via a company invoice in the future. It was not our intention to upset you or your books over in England with our actions. That's why I paid you for the

407 shear, that we just got payment for by check, even though it has not even had time to clear our bank! We have all worked very hard to build up confidence in each other and we have no desire to jeopardize those strides. I have faxed over an invoice for the commission today, and I will send you out a hard copy in the mail.

With regards to the control box and pot, boy are we confused. When David was here in our facility he personally viewed the already damaged control box and was completely aware of it's condition. We offered to help with any cosmetic repairs to the machine that needed to be done and he stated that J. McIntyre England would make all necessary repairs to the unit on site and he did not want us to spend any more time or money to assist in preparing it for delivery toTIMCO. That unit left our shop looking EXACTLY as it did when David visited us. No further damage was made to the TARDIS unit from the time it left here until when it reached Timco that we have been made aware of. As for the pot, why did you give them a free pot? We still have a pot here that we are waiting for them to pick up since they could not fit it on the truck they sent to pick up the TARDIS unit. Perhaps there is some miscommunications happening here. It was our understanding that they (Timco) would send another truck to pick up the remaining pot ASAP, so we have had it sitting outside for pickup ever since. Let us know what you want us to do with it. As always, we will be happy to assist.

We are, of course, extremely disappointed to hear that the container may be delayed. It is of course very difficult to sell a product that you can not deliver. We have

received preliminary reports from our distributors stating that they did have some inquires for shears at the show. No one has asked for a firm order yet, but we will of course need to know what the time frame for delivery to us will be if a delay on your end is in fact necessary.

Lastly, the issue of the insurance claim. In the papers I faxed to you today, there is a typo where it lists our company (McIntyre America) twice as defendants. They have since clarified that and J. McIntyre Machinery England has been formally named as defendants in the suit as well. Our lawyer says that this is a big problem for all of us if we are not represented in Boston on May 23rd since it would constitute default on our part and we would ALL be personally liable for the automatic $2,000,000 judgment! And we thought our credit line was maxed out now, HA. Not really funny if it should come to that. All of us desperately need your insurance company's lawyer to contact the court AS SOON AS HUMANLY POSSIBLE so we can get this matter under control. I will look to hear from you on Monday after your meeting.

Regards,

Mary

Sally Johnson wrote:

Hi Mary, Mike has just handed me your fax regarding the bank transfer. We discussed this at ISRI. We simply cannot accept contra's for commissions, when

APPENDIX RR — EXHIBIT R TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: FACSIMILE LETTER FROM MICHAEL POWNALL TO GREG, DATED NOVEMBER 23, 1999

To: Greg From: Michael Pownall

Company Name: McIntyre America

No. of Pages: 1 Date: 23 November 1999

This is just to confirm our telecom of today. As you know, we are unhappy with the present situation. All we wish to do is sell our products in the States - and get paid! If this isn't possible then the only other option open to us is for us to split up in an amiable fashion as quickly as we can. I note that you still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full.

Please get Gary or Mary to contact me as a matter of urgency.

Regards

/s/
Michael Pownall

APPENDIX FF — EXHIBIT S TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: LETTER FROM SALLY JOHNSON TO GARY AND MARY GAITHER, DATED JANUARY 13, 1999

To: Gary/Mary From: SALLY

Company Name: McIntyre America

No. of Pages: Date: 13 January 1999

Dear Mary,

I'll use the fax rather than email. I'm not convinced that you ever get any of my messages!

I have spoken to the Boss regarding your last email, and we both agree that it is time he and I came over to visit you to see how we can get things back on an even keel and move the businesses forwards. As such we will be over within the next few days - could you let us know what dates would be most convenient for you and we will try to fit in with those?

In the meantime, we will arrange for collection of the remaining TARDIS, and ancillaries, and for collection of the Alpack which should help to get your storage costs down. I note also that you have 3 640s unsold which I understood to have been sent out against firm orders - otherwise we wouldn't have built them! Perhaps we should also look at bringing a couple of those back also. It is important for us to try to turn some of your stock into cash as quickly as possible, since it is presently

costing us £20,000 per year to fund it. If we can get the stock levels down, then we could look again at machine costings and perhaps in the short term try to send out fewer machines but give you more margin on them.

With reference to TARDIS I think that we all expected the machine to sell better in the States, and we are still confident that it will - after all, Altek have now sold 80 units into America. Unfortunately, it is impossible for us to let you know exactly what you can expect to earn out of TARDIS in the future — we've got to sell some first.

We are all too aware that in the present climate there is no money to be earned out of small shears and balers. Unfortunately, McIntyre UK hasn't been able to earn money out of them for several years - when the States has been good, the rest of the world has been lousy! It is for this reason that we pushed all of our efforts into TARDIS, recognising that we had to diversify. (can fully understand your looking into other business areas and see no reason why this should affect our relationship, providing they don't stop you from selling all the small shears it is possible for you to sell - and servicing all the TARDIS it is possible for you to service! But these are all matters which can be discussed better face to face. Let us know when we can visit. Talk to you soon.

Regards

Sally

APPENDIX GG — EXHIBIT T TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: LETTER FROM SALLY JOHNSON TO GARY AND MARY GAITHER, DATED JANUARY 13, 1999

To: Gary/Mary From: SALLY

Company Name: McIntyre America

No. of Pages: Date: 13 January 1999

Hello there,

Sorry to hear about the weather at your end. It's snowing here at the moment, and being the UK, about 1/2cm snow constitutes a national emergency! Mike has asked me to contact you about a number of things relating to his conversation with you yesterday and your subsequent email message. Obviously we are all trying to deal in difficult times at the moment, and we need to support each other as much as possible. I don't know what has happened with respect to spare part payments and Helen tells me that you are unable to pay for spares. Obviously this concerns us, and we need to sort out some way of going forward. We have invoices dating back to Feb 98 which are not in dispute, together with even earlier ones which need agreeing, or not, as the case may be. We will have to know when you intend to remit this outstanding money. Also, Mike tells me that he has asked for a stock update and we haven't yet received it. This was needed for our accounting procedures and is now urgent. Any stock which has been unsold for some time, especially for example the TARDIS 1061 and

ancillaries needs to be returned back here, at our cost, to get your stock levels to an acceptable level.

I can fully understand your reluctance to visit Nottingham in the present climate, and agree that there is plenty for us to discuss. As such, I have asked Mike to arrange to visit you within the next two to three weeks to clarify the spares/stock situation and try to get things moving before ISRI. In terms of finding something else to sell - don't think that we haven't been racking our brains to think of something, and any input would be appreciated. We have looked at trying to redesign the shears/balers, but the market just doesn't seem to be there, regardless of what the machines look like or their final selling price. Personally, I think that we may have to look outside the scrap metal trade, but generating new product ideas isn't that easy!

As far as TARDIS is concerned, we simply cannot afford to continue at our present sales level in the States. We had to accept ourselves that TARDIS selling was for specialists. As such we have appointed sales agents around the world which are actively involved in the foundry industry, and a TARDIS sales director here who has been selling furnace equipment for 20 years. He was immediately able to make the inroads into the likes of Alcoa and Alcan, which we have been trying to make for the last three years! Our sales director, Harry, is fluent in Portuguese, and has taken over control of the South American market as part of his remit. As I understand it - and David isn't here at the moment and in a completely different time zone - David has appointed

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Pyrotech to sell TARDIS in the States in line with our policy of appointing foundry equipment supply companies to sell TARDIS. Pyrotech therefore become the TARDIS sales agents, handling all sales, marketing, exhibitions etc. His idea is then that sales in the States will start to come in, as they have from the rest of the world, and that McIntyre America can take over the after-sales support, commissioning, service etc - obviously at an attractive rate. The agreement is fairly loose at the moment and needs tightening up at a later date, but we feel that anything is possible once we sell a few of these machines. There is then margin in it for all of us. We were approached by Pyrotech and feel that we have to give it a go for all of our sakes.

With respect to TMS, Pyrotech have a stand there and have asked that we support it with a TARDIS machine. David will be attending the show with Harry, and would of course be pleased to receive a visit from you!

I agree that it may be the time to attend ISRI without machines in order to keep costs to a minimum and look forward to hearing your ideas for the show - so long as I don't have to wear a bikini I'll be happy!

Mike will liase with you regarding his trip. It would be nice to get together, get the backlog cleared up and make a new start. Talk to you soon,

Regards

Sally

APPENDIX HH — EXHIBIT W TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: REPORT OF JAMES F. CUZZUPE, P.I., DATED OCTOBER 7, 2004

SUBJECT: Robert Nicastro

TO: Rokaski & Ross, P.C.
Alexander W. Ross, Jr., Esq.
76 East Main Street
Marlton, N.J. 08053-2142

FROM: James F. Cuzzupe, P.I.

DATE: October 7, 2004

CASE NO.: 2004-37-A

Circumstances: Robert Nicastro sustained a loss of four fingers on his right hand from an accident that occurred on October 11, 2001. Robert Nicastro was in the employ of Curcio Scrap Metal, 416 Lanza Avenue, Garfield, NJ, when he was operating a J. McIntyre Shearing Machine when this accident happened.

Job: Contact scrap metal recycling plants within the State of New Jersey to see if they use any type of machinery manufactured by the J. McIntyre Company, specifically, a sheer machine to cut metal, a.k.a. "alligator shearing machine".

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Summary: Investigation finds Strip Technology Inc. (Strip-Tec), Fort Worth, Texas, provided the names of four business establishments in New Jersey that their company has sold J. McIntyre Alligator Shears to. The only verification of J. McIntyre Alligator Shears at any of the four company names provided by Strip Technology Inc. was at Cinelli's Scrap Metal.

Previous Report: A previous report dated September 27, 2004, has been submitted to your office in this matter.

Requester Contact: On September 30, 2004, your office (Tom McHugh) was in contact with me. Instructions were given to continued this investigation and pursue any additional scrap metal companies that may have J. McIntyre shearing machine.

OCTOBER 5, 2004 (Tuesday)

Bob Alexander
c/o Skip Tec
Fort Worth, Texas
1-800/426-4126

On October 5, 2004. I dialed 1/800/426-4126 and spoke with a male who identified himself as Bob Alexander, sales representative for Skip Tec.

I asked Mr. Alexander for a customer list of New Jersey customers who purchased J. McIntyre machinery, more specifically, the shearing machine. Mr. Alexander provided the following information -

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(Telephone Directory listing - 609/465-7406)

a) Raff recycling, Cape May Court House, New Jersey

b) Curcio Scrap Metal, Saddle Brook, N.J. (Telephone Directory listing - 973/478-3133)

c) Cinelli Scrap Metal, Hackensack, N.J (Telephone Directory Listing -169 McKinley Ave., Hackensack, N.J. 201/488-2588) 250 Division Place, Hackensack, N.J. 201/487-5353

(Mr. Alexander, Strip Tec, indicated a recent purchase was made by Cinelli's within the past two months.)

d) Max Weinstein Scrap Metals, Union, N.J. (Telephone Directory Listing - 908/686-8236)

OCTOBER 6, 2004 (Wednesday)

Raff Recycling
Goshen Road
Cape May Court House, N.J.
609/465-7406

On October 6, 2004, I talked to Steve at Raff Recycling. Steven informed that their "Alligator Shears" is a Deltax Shear.

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Max Weinstein Scrap Metals
2426 Morris Avenue
Union, New Jersey
908/686-8236

On October 6, 2004, I made contact with Max Weinstein Scrap Metals. This place of business is under new management. I spoke to Elvis, new owner. Elvis related there are three "alligator shears" at his place of business. Elvis did not know if the shears were J. McIntyre. The shears are old and identification of the machines is not visible. Elvis extended the invitation to me to visit his shop and view the shears.

On October 7, 2004 (Thursday)

Cinelli Scrap Metal
169 McKinley Avenue
Hackensack, N.J.
201-488-2588

On October 6, 2004, I made contact with Cinelli's Scrap Metal. The male I spoke would not verify nor deny that their company was in possession of J. McIntyre Allegator Shearer". This male would not divulge any information pertaining to their company's operation. This male will have the owner of the company call me back. This male would not give any first or last name of who would be calling me back. There is some indication that this male was familiar with J. McIntyre when he said, "I would not go against J. McIntyre".

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On October 7, 2004, (Thursday) I received a call from a male who identified himself as Craig Cinelli, owner of Cinelli's Scrap Metal. Mr. Cinelli was skeptical of why I was in contact with his company and how I was able to obtain the information concerning Cinelli Scrap Metal at 169 McKinley Avenue, Hackensack. NJ. Without divulging any names in this civil litigation, Mr. Cinelli was informed that there is civil litigation not involving his company. He was informed that the address and phone number for Cinelli's Scrap Metal was obtained through information on the internet yellow pages.

Mr. Cinelli acknowledged that his company does have a small J. McIntyre Shear machine. Mr. Cinelli would not divulge any further information until he was satisfied as to the purpose of the inquiry.

NOTE: The other company name that has been provided by Bob Alexander is Curcio Scrap Metal, Saddle Brook, N.J. (973/478-3133). Curcio Scrap Metal was not contacted by me because of the similarity of Curcio Scrap Metal, 416 Lanza Avenue, Garfield, N.J., in this litigation.

Closing Note: This report is being submitted to you for your review and evaluation. Should you have any questions or wish to discuss this matter please be in touch with James F. Cuzzupe, P.I.

Respectfully submitted,
s/
James F. Cuzzupe. P.I.

APPENDIX II — EXHIBIT X TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, DATED OCTOBER 11, 2006: CAPTION PAGES OF PLEADINGS IN SUITS AGAINST J. McINTYRE MACHINERY, LTD. IN ILLINOIS, MASSACHUSETTS, KENTUCKY AND WEST VIRGINIA

STATE OF ILLINOIS Atty code 12991
1/21/99 204842
SS:

COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
LAW DIVISION

CLARENCE MILLER, JR.,

Plaintiff

v.

MCINTYRE MACHINERY AMERICA, LTD.,

Defendant

COMPLAINT AT LAW

COUNT 1

Plaintiff, CLARENCE MILLER, JR., by his attorneys, DOMBROWSKI SORENSEN, complaining of the Defendant, MCINTYRE MACHINERY AMERICA, LTD., (Hereinafter "MCINTYRE"), alleges as follows:

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1. On or about January 21, 1999, Defendant MCINTYRE, was a corporation doing business in the County of Cook and State of Illinois, and was in the business of sales of various machine products; including a "McIntyre 320 Metal Cleaning Shear.

2. At some time prior to January 21, 1999 Defendant sold the aforesaid Metal Cleaning Shear to Lakewood Recycling Center, Inc. located in Chicago, Illinois.

3. On January 21, 1999, Plaintiff, CLARENCE MILLER, JR., was employed as a machinist at Lakewood Recycling Center and was assigned to the aforementioned Metal Cleaning Shear.

4. On January 21, 1999, while using the aforementioned Metal Cleaning Shear

Appendix II

UNITED STATED DISTRIC COURT
DISTRICT COURT OF MASSACHUSETTS

C.A. 99-CV-10145-PBS

RICHARD GRAHAM AND
MARGARET L. GRAHAM,

Plaintiffs

v.

ALAN ROSS MACHINERY CORP.,
J. MCINTYRE (MACHINERY) LTD. AND
MCINTYRE MACHINERY AMERICA, LTD.,

Defendants

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE PLAINTIFF, RICHARD GRAHAM TO A DULY QUALIFIED OFFICER OF THE DEFENDANT, J. MCINTYRE (MACHINERY) LTD.

Q.1) Please state your name, age, residential address, occupation, name and address of your employer, present position with the Defendant Corporation and the dates you have held said position.

Answer 1

Sally Johnson, Age 37, Managing Director, J. McIntyre Machinery/Nottingham Metal

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Recyclers.NMR House, Alcester Street, Dunkirk, Nottingham, NG7 2SD

Q.2) Concerning the Defendant, J. McIntyre (Machinery) LTD., please state:

a. Its full and complete corporate name as of the date that this Interrogatory is answered and its date and place of incorporation; and

b. Its principal place of business for each year from 1994 to the present.

Answer 2

J. McIntyre Machinery, Ltd.
Incorporated in England, July 10, 1975

Appendix II

COMMONWEALTH OF KENTUCKY
28TH JUDICIAL DISTRICT
PULASKI CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 00-CI-00797

DAVID B. WHITAKER

PLAINTIFF

and

SOMERSET SCRAP METAL COMPANY

and

MIDWESTERN INSURANCE ALLIANCE, INC.

INTERVENING PLAINTIFFS

v.

SOMERSET SCRAP METAL CO.
LAKE CUMBERLAND, LLC Delaware Corporation
d/b/a LAKE CUMBERLAND REGIONAL
HOSPITAL and LAKE CUMBERLAND REGIONAL
HOSPITAL, LLC

DEFENDANTS

* * * * * *

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ANSWER TO INTERVENING COMPLAINT

Defendant Lake Cumberland LLC d/b/a Lake Cumberland Regional Hospital and Lake Cumberland Regional Hospital, LLC (hereinafter referred to as Defendant) for their answer to the intervening complaint of Somerset Scrap Metal Company, and Midwestern Insurance Alliance, Inc., states as follows:

FIRST DEFENSE

The intervening complaint fails to state a claim upon which relief can be granted.

Appendix II

IN THE CIRCUIT COURT OF CABELL COUNI'Y,
WEST VIRGINIA

Civil Action No. 99C0326

MIKE SMITH d/b/a
EMPIRE RECYCLING

Plaintiff,

v.

McINTYRE MACHINERY AMERICA, LTD., INC.,
a Corporation and J. McINTYRE MACHINERY,
LTD, a foreign Limited Partnership, and DOES
1-100, inclusive,

Defendants.

COMPLAINT

For a cause of action herein your plaintiff, Mike Smith d/b/a Empire Recycling, respectfully alleges and says as follows:

COUNT ONE

1. At all time mentioned herein, Mike Smith d/b/a Empire Recycling, was a citizen and resident of Cabell County, West Virginia.

2. McIntyre Machinery America, Ltd., Inc. is a

corporation duly organized and existing in the state of Ohio.

3. At all times mentioned herein, Defendant, J. McIntyre Machinery, LTD, is a foreign limited partnership duly organized and existing under the laws of England, having it's principal place of business located at Harrimans Lane, Dunkirk, Nottingham, NG7 2SD, England, and at all times material hereto, was engaged in the business of, among other things, designing, manufacturing, selling and/or distributing of J. McIntyre Machinery, LTD Alpack 5000 Can Densifier and a J. McIntyre Machinery, LTD Alpack 2000 Can Pre Sorter, many of which entered the stream of commerce in West Virginia.

APPENDIX JJ — TRANSCRIPT OF HEARING BEFORE THE NEW JERSEY SUPREME COURT, DATED JANUARY 21, 2009

Colloquy

CHIEF JUSTICE RABNER: The first matter of the day is *Nicastro v. McIntyre Machinery America, Limited.* Can we have appearances of counsel, please?

MR. GOOBY: Steven F. Gooby from the firm Morison, Ansa, Holden, Assuncao & Prough for the Appellant and Defendant J. McIntyre Machinery, Limited.

MR. ROSS: Alex Ross, Rakoski & Ross, for Robert Nicastro, the respondent in this case and plaintiff to (indiscernible).

MR. MILLER: Jonathan Miller, Locks Law Firm and the New Jersey Association for Justice known last year and before that as the Association of Trial Lawyers of America of New Jersey, as Amicus Curiae.

CHIEF JUSTICE RABNER: Welcome, Counsel.

Mr. Gooby?

MR. GOOBY: May it please the Court? I'd like to respectfully request five minutes for rebuttal.

CHIEF JUSTICE RABNER: We'll gladly have you up for rebuttal. We usually have it for a little shorter

period. Please go ahead.

MR. GOOBY: Two minutes would be fine or any amount of time would be great, Your Honor. Thank you.

This petition presents the opportunity for this Court to revisit the stream of commerce theory of personal jurisdiction and to settle the important question of whether New Jersey should adopt the stream of commerce plus test espoused by Justice O'Connor's plurality opinion in the United States Supreme Court case *Asahi Metal Industry v. Superior Court of California.*

We respectfully request that this Court affirm the Appellate Division's adoption of the stream of commerce plus rationale as the law of the State, but we respectfully request that it reverse the Appellate Division's judgment because that court misapplied this rationale in this case to J. McIntyre Machinery, which is a British company that did not direct any conduct towards or have any conduct with the State of New Jersey.

In the more than 20 years since *Asahi* was decided, this Court has considered the stream of commerce theory in several cases, but in each case personal – the personal jurisdiction question was resolved, as this Court stated in *LaBelle v. Everglades Marina* (phonetic), by avoiding any areas of unsettled jurisprudence and hewing closely to the limited fundamentals about which there is little or no dispute or debate; namely, the minimum contacts analysis first

articulated in the *International Shoe* case.

In this case, we submit, the facts presented do not allow for a personal – for personal jurisdiction to be found under a traditional minimum contacts analysis. J. McIntyre Machinery, which I'll refer to as JMM, has no presence in New Jersey and never conducted any activities here. For example, it's undisputed that JMM has no property, bank accounts, employees, sales offices, or representatives in this State. In addition, it's not licensed to do business in New Jersey and it does not generate revenue or pay taxes here. Thus, personal jurisdiction can be exercised over JMM by this State's courts only pursuant to the stream of commerce theory.

Justice O'Connor's stream of commerce plus test should be adopted and applied here because it requires additional conduct by a foreign defendant before the mere placement of product into the stream of commerce results in – in the exercise of personal jurisdiction.

The additional conduct element is in accord with decades of this Court's in persome (sic) jurisdiction and jurisprudence requiring a foreign defendant to have purposely availed itself of the privilege of conducting activities within New Jersey, thus, invoking the benefits and protections of our laws before personal jurisdiction may be exercised.

Under the stream of commerce plus rational New Jersey courts cannot exercise personal jurisdiction over JMM in this case. Under the rationale, the placement

of a product into the stream of commerce without more is not an act of the defendant purposely directed towards the State; thus, an exercise of personal jurisdiction over a foreign defendant such as JMM requires the defendants who have engaged in additional conduct directed towards the forum state.

The Appellate Division recognized below that such conduct, as Justice O'Connor espoused, could include designing a product particularly for the forum state, advertising in the forum state, establishing service channels for customers in the state, or marketing through a sales agent in the forum state. The Appellate Division also inclusively recognized that all but the last of these criterial were plainly inapplicable to this case, and only by misconstruing the plus factor of sales agent in the forum state and misapplying to that factor, purported facts created by inferences the Court made from JMM post-sale and post-accident communications was the Appellate Division able to find jurisdiction over JMM.

There are no competent facts in this case that establish that JMM marketed the subject product or any product through a sales agent in New Jersey. McIntyre America was JMM's Ohio based distributor that had no presence in New Jersey. No sales agent of any kind in New Jersey was involved in the sale or shipment of the product from McIntyre America in Ohio to Plaintiff's employer in New Jersey. Thus, the Appellate Division incorrectly determined that JMM is subject to personal jurisdiction based on the faulty

premise that JMM sold product to a single Ohio based distributor, which, in turn, resold the products in the United States JM – that JMM was intent on doing business in New Jersey even though there was no showing that JMM ever directed any of its conduct towards New Jersey.

From the factual inferences it made, the Appellate Division improperly held that JMM purposely availed itself of the privileges of conducting business in the United States and should, therefore, be subject to a New Jersey court's exercise of personal jurisdiction since New Jersey is one of the 50 states and a possible location for one of these products.

Moreover, the Appellate Division incorrectly held that one element of the stream of commerce plus test requires a foreign defendant to be aware that its product "might end up in New Jersey." This directly contradicts Justice O'Connor's articulation, which the Appellate Division even cited to in its decision, that mere awareness that the stream of commerce might sweep the product into the forum state would not convert the mere act of placing the product into the stream of commerce into an act purposefully directed towards the forum state.

By misconstruing and misapplying the stream of commerce plus test the Appellate Division, thus, announced an incorrect standard for the exercise of personal jurisdiction in this State under the stream of commerce doctrine. Accordingly, the Appellate Division's

judgment should be reversed.

Finally, even if the stream of commerce rationale espoused by Justice Brennan were adopted by this Court as opposed to Justice O'Connor's view, the Appellate Division held, it would still be improper for New Jersey courts to exercise personal jurisdiction over JMM. Under Justice Brennan's view, as long as a manufacturer is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise.

Here JMM's products were not marketed in New Jersey, nor was JMM aware of any marketing in New Jersey because there was none. The sale of the subject machine came about because plaintiff's New Jersey employer, Mr. Curcio, traveled of his own accord to a Las Vegas trade show without any impetus from JMM where he — where Mr. Curcio presumably saw many different machines, including a JMM machine. However, there's no evidence that Mr. Curcio spoke with anyone from JMM about the machine or that JMM was in any way aware that he was from New Jersey. Mr. Curcio then traveled back to New Jersey at some later time, which could be as much as a year or more. Later his son called McIntyre America in Ohio to order a shear machine, which was shipped from Ohio to New Jersey without JMM's involvement or knowledge.

THE COURT: Counsel, both Justice O'Connor's opinion and Justice Brennan's were — were tailored to the facts of *Asahi*, which dealt with a supplier who was

providing to an ultimate distributor apart with that ultimate product being — been marketed in the United States. So it's a little bit different. So when you were reading from Justice Brennan's that the final product is being marketed, he was tailoring his remarks to the particular facts of *Asahi*. Let's take the facts over here. Where it appears that your client, McIntyre, was marketing the entire United States, the British company didn't know when it was holding a trade show in Las Vegas whether or not there would be a California purchaser, a New York purchaser, a Georgia purchaser, or a New Jersey purchaser. They were happy to have any purchaser from any state. Their entire marketing area was — was the United States of America. Take — are you suggesting that the only areas where — only places where there could be suit would in what, Nevada, where maybe a single product wouldn't have been sold just because of the fortuitous circumstance that the trade show was there? Or in Ohio where the distributor was shipping out the machines, even though there may not have been a purchaser in Ohio? Why is it asking too much when a foreign manufacturer is targeting the entire United States and it's sending perhaps a dangerous instrument that is deeply flawed, that it be held accountable in the — in the jurisdiction where the product is actually — actually purchased?

MR. GOOBY: First, Your Honor, I believe that marketing is more than just sort of a cerebral concept that I — we'd like to sell our product in the United States. I believe marketing, and then Justice Brennan, I think, focused on that, is — it has to be more than

that. It has to be some conduct, some activity directed towards a state to market, to sell, to offer for sale the product. At these trade shows — and the evidence in the record shows that at these trade shows it was not uncommon for customers to approach the representatives at the booth and actually place orders for the machine. Well, clearly at that point they would know that this is a customer from New York or California or wherever it may be, and they sign them up to sell the order. I think that would result in personal jurisdiction. There's knowledge of a marketing effort towards that state. Here there was no — there is no evidence of any marketing effort towards New Jersey. There's no evidence that Mr. Curcio made it aware that he was from New Jersey.

THE COURT: Well, the marketing effort is toward everyone, right. Toward every state. Correct?

MR. GOOBY: But I think marketing — again, I think marketing has to be — it has to be something. It has to be more than just we want to sell to —

THE COURT: But your client knows that a trade show attracts people from all over the country, correct?

MR. GOOBY: And perhaps all over the world, sure.

THE COURT: You weren't just expecting people from Las Vegas, were you?

MR. GOOBY: Not specifically. Certainly not.

THE COURT: Okay. You were hoping that anyone interested in the machine from anywhere in the United States would be visiting the trade show and would be sold on the product, correct?

MR. GOOBY: Correct.

THE COURT: So that person — one of those people happened to be from New Jersey.

MR. GOOBY: But, again, when we're talking about personal jurisdiction, we're talking about — and I think the concept in Justice O'Connor's plurality opinion is — is important to keep in mind in the sense that it requires additional conduct, it requires purposeful availment. She didn't want to lose that aspect, so —

THE COURT: You know, that was 21 years ago. That was Justice O'Connor, then you had Justice Brennan. The world has moved on. We're a smaller world. Globalization is here. There are multinational corporations that market and distribute all over the world, and in ways in which they try to insulate themselves by having exclusive distributors in particular countries. When they're passing along dangerous products, why should we insulate them when a dangerous product winds up in New Jersey and winds up injuring one of our citizens? They should be taking out insurance to protect against that possibility, don't you think?

MR. GOOBY: I think that, again — well, first of all, even though *Asahi* was 20 odd years ago, I don't think, although the world clearly has advanced in many, many ways, that the idea of globalization was not present in 1987. I think there was certainly considerable global marketing activity. I don't think that concept has really changed and I don't think that concept that Justice O'Connor, were she deciding the *Asahi* case today, would view it any differently. I think she still wants to look at state sovereignty and determine that under the —

THE COURT: How about our opinion in *Charles Gendler & Company*? And I will court — quote our Court.

"A manufacturer's awareness of the distribution system through which it receives economic and legal benefits justifies subjecting the manufacturer to the jurisdiction of every forum within its distributor's market area." That's our Court.

MR. GOOBY: That is our Court, and I think that in light of *Asahi* and in light of the comments that this Court made in *LaBelle v. Everglades Marina*, that the stream of commerce doctrine is unsettled as a result of *Asahi*. I believe it reflects on the continued validity of *Gendler* because I think the doctrine has been advanced and refined by *Asahi*. Even though it was a plurality decision, there's still a — with Justice Brennan's view, which is the most liberal, I would — I would suggest, that there's a floor for due process rights of foreign defendants. So — but even in *Gendler*, *Gendler* required

knowledge, actual or constructive, of the distribution system, and what we have here is nothing more than one product being sold to New Jersey. There's no evidence of any other sales to New Jersey. There's no evidence of any other knowledge of JMM of sales to New Jersey.

THE COURT: What if it sold one of those machines to each of the 50 states, excluding Nevada and Ohio? Jurisdiction nowhere? They got 48 of those machines. What, they sell for about $20,000 a piece? Got to go to — everyone's got to go to England?

MR. GOOBY: Well, I don't think that's the case, Your Honor. I think that Ohio would be — very tough to argue that there wouldn't be personal jurisdiction over JMM in Ohio. There was conduct being transacted — or business being transacted there. Again, it's a single machine, and I think the cases that have sort of taken this globalization concept to sort of imply, although no one's quite ready to say yet, that if you sell the product anywhere and it ends up anywhere, you're subject to — you're subject to personal jurisdiction wherever it ends up. That's exactly what *Asahi* was trying to avoid. That's what —

THE COURT: Well, that's — this is different, because in *Asahi* you had a Japanese corporation that gave a part to a Taiwanese corporation and the Taiwanese corporation then took the product to California. McIntyre has flown into Las Vegas, into this convention center, and is attempting to sell with its

exclusive distributor the product. It's a lot different from *Asahi*, and *Asahi* was an — was also the enforcement of an indemnification clause in California between a Japanese and a Taiwanese corporation. That's a lot different from this case.

MR. GOOBY: I agree the facts are different, but I think the intention of the Supreme Court in deciding that case was to refine the concept of stream of commerce — the stream of commerce theory of personal jurisdiction —

THE COURT: Well, and they — and they willfully failed it then because neither theory garnered a majority of the Court. The only thing *Asahi* stands for precedentially was that you couldn't exercise jurisdiction against *Asahi* consonant with due process, because the only thing anybody agreed with was there weren't sufficient minimum contacts to justify the exercise of jurisdiction. So why are you chasing *Asahi*? I don't get it.

MR. GOOBY: Because I think even — the Supreme Court has announced its view, and obviously it was a plurality decision. It wasn't definitive.

THE COURT: So it's non-precedential.

MR. GOOBY: But it's —

THE COURT: And this Court has never said that it

is adopting the stream of commerce theory. I don't understand why you, representing a defendant, would even allow those words to pass your mouth.

MR. GOOBY: Well, I think in *Gendler* this Court did adopt the stream of commerce theory and had revisited it in other cases such as *LaBelle* and —

THE COURT: Charles — *Charles Gendler* also says, and I quote:

"Defendant's contacts with the forum must be so continuous and substantial as to justify subjecting the defendant to jurisdiction."

I can give you a page site to that. Now if that's what *Gendler* stands for, which is what I think it stands for — I still haven't gotten an answer to my question, which is why you're chasing *Asahi*.

MR. GOOBY: Well, I was — I was under the impression — and it's my reading of *Gendler* that — the passage that Your Honor just cited was with respect to general jurisdiction and whether or not it would — defendant would be subject to New Jersey jurisdiction no matter what.

THE COURT: Well, that's an interesting theory because there are two types of jurisdiction, correct? General and specific.

MR. GOOBY: Correct.

THE COURT: And the allegations in this case were not general jurisdiction allegations, they were specific jurisdiction allegation — allegations, weren't they? What relevance does the stream of commerce theory have to specific jurisdiction cases? Isn't it really only limited to general jurisdiction cases?

MR. GOOBY: I think it — I'm happy to argue in the alternative if the Court is not inclined to adopt the stream of commerce theory yet, as such, for specific jurisdiction, but —

THE COURT: Well. Well, no. Take specific jurisdiction is when the product winds up — isn't this a specific jurisdiction case?

MR. GOOBY: This is — yes. It clearly is.

THE COURT: Because McIntyre targeted the United States, the product was purchased by a New Jersey customer and who was — who was injured in this State, and New — and that New Jersey citizen decided to sue in this State based upon the stream of commerce theory with specific jurisdiction.

MR. GOOBY: Right. And I think the stream of commerce theory came about in this case because there are no facts whatsoever, as the trial court found, and the Appellate Division confirmed as well, that allow an

analysis under traditional minimum contacts analysis. The facts are just not here to define any contacts by JMM that would give rise to personal jurisdiction in this State. So as the Appellate Division discussed, you look to what alternatives we have, and the Court found that stream of commerce — the Appellate Division found the stream of commerce theory would be one way to try to attempt to exercise jurisdiction.

THE COURT: Can I ask you a question? If this New Jersey citizen went through Ohio, would you be defending on the basis of you can't sue in Ohio, McIntyre isn't in Ohio, this person — this exclusive distributor is not a part of the corporation, and, therefore, go somewhere else?

MR. GOOBY: I don't —

THE COURT: Would you — would you be arguing that?

MR. GOOBY: If this — if this action was filed in Ohio, I think it would be much different and much more hard — much harder for me to argue that Ohio would not have jurisdiction over JMM.

THE COURT: But would you argue? I'm going to ask you now. If they go — if they wind up picking up their suitcase and going to Ohio, are you going to argue that Ohio has no jurisdiction?

MR. GOOBY: Although I have a lack of familiarity with Ohio law, Your Honor, I think I would be very hard pressed to argue that having the facts that this particular product was shipped by JMM from England into — into Ohio, so I think we'd be hard pressed to say that Ohio would not be —

THE COURT: Well, it wasn't just shipped, it was sold to somebody in Ohio.

MR. GOOBY: It was sold to somebody in Ohio. That's correct.

THE COURT: Pursuant to an ongoing commercial relationship.

MR. GOOBY: Correct, Your Honor.

THE COURT: Is it a real stretch for you to say there is jurisdiction against JMA England in Ohio?

MR. GOOBY: Only to the extent if Ohio has some peculiarity in their jurisdiction law I don't want to — to —

THE COURT: Well, let's — let's assume it's not Mars. Okay?

MR. GOOBY: If the law is the same as we have here in New Jersey, I think there would be personal jurisdiction over JMM in Ohio.

THE COURT: How about if it's in the same ballpark as New Jersey?

MR. GOOBY: Same ballpark.

THE COURT: Thank you.

CHIEF JUSTICE RABNER: You've stressed the fact that there was a single sale to New Jersey, but because of the way the sale went down, there are insufficient contacts with New Jersey. Suppose there were 15 sales that all grew out of the same approach here, where people like the Curcios went to a convention in Nevada? Under your theory there would still be no jurisdiction in New Jersey?

MR. GOOBY: I think it's not so much the focus on how many sales there were, but it's the number of sales that should give rise to either actual or constructive knowledge of the manufacturer that its products are being sold in New Jersey. So if we look at the *Harley-Davidson* case, the *ADC v. Harley-Davidson* case, which this Court decided as well, jurisdiction was found against a — again, a component part manufacturer, in that case from Wisconsin or Minnesota, I forget which. But the reason that jurisdiction was found even though they only sold to Harley-Davidson's factories, which were in Pennsylvania and Wisconsin, but not in New Jersey, they found that the — the component part manufacturer had to know that its parts were being put into Harley-Davidson motorcycles and that Harley-Davidson had 15 factory-authorized dealerships in the State of New

Jersey. It had to know that its products would be sold through that distribution network in New Jersey. So, again, I think it's not so much the count, but whether or not the number of products — and, I submit, once you get past a few, when you get into 10, 20 or 100 or 1,000 or more, I think it's much more difficult to argue that there's no awareness of the product ending up in a state such as New Jersey. But here we have one, —

CHIEF JUSTICE RABNER: Do we know the number

MR. GOOBY: – and it's from prior knowledge. I'm sorry.

CHIEF JUSTICE RABNER: Do we know the number of sales per years in the United States?

MR. GOOBY: I do not, Your Honor. That's — it's not in the record.

And, again, this is a — a fairly unique machine, and as I understand the facts in the record, when a sale came in, the order was placed over to JMM in England and they would actually build the machine. So it wasn't, you know, go to the warehouse and get 1,000 of these and put them on a ship. It was, okay, you have an order, call the factory, build one, ship it. So it was a very limited, limited production specialized type of machine.

THE COURT: Well — and, Mr. Gooby, correct me if I'm wrong, but when it was — the order came in, the order came in from McIntyre America?

MR. GOOBY: In Ohio, yes.

THE COURT: And title was passed to McIntyre America?

MR. GOOBY: Upon shipment to Ohio.

THE COURT: And once McIntyre America had it, did McIntyre England know who the ultimate recipient of it was going to be?

MR. GOOBY: No, and there are facts in the record where there were requests made by JMM to McIntyre America, tell us who your customers are, tell us where you're sending our machines, and they refused to provide that information.

THE COURT: Well, they may have, but with the machine weren't there instruct — instructions to — to contact the — the manufacturer if there were problems or if you needed further instructions on how to operate the machine?

MR. GOOBY: The user's guide that came with it, I believe McIntyre America would put its own sticker over there and would have its — its address and phone number. I'm not sure if it had the phone number on there or not, but I think there's also evidence that JMM, because it was a manual that it printed, also had its contact information as well, so —

THE COURT: I thought that the sticker thing was on the machine proper and that McIntyre America put its sticker above or on top of the JMM England sticker, but that the user's manual, the owner's manual or whatever, instruction booklet, specifically instructed the user that if it had questions, it could address the questions both to Ohio and to England.

MR. GOOBY: That may well be, Your Honor. That may well be.

THE COURT: And weren't these products also on consignment; that is, McIntyre in England sent it to its exclusive distributor, didn't get anything from the exclusive distributor until the product was actually sold?

MR. GOOBY: Well, in fact the consignment is what McIntyre America tried to turn this into, which is in no way what JMM wanted. JMM, upon receipt of a firm order, at least what it considered to be a firm order from McIntyre America, would then go spend the resources to build a machine and ship it, and apparently what was happening — the Appellate Division cites some of this post — post-sale evidence and maybe even post-accident communications, apparently these firm orders were not really firm orders. Nevertheless, JMM, believing they were firm, made the machine and sent it to Ohio where it sat in storage while McIntyre America looked for a purchaser. So JMM was actually getting the brunt of that — of that situation. It had nothing to do with inventory control or anything like that that the Appellate Division suggests.

Appendix JJ

CHIEF JUSTICE RABNER: Mr. Gooby.

THE COURT: Counsel — excuse me.

CHIEF JUSTICE RABNER: Please.

THE COURT: Counsel, were there cases in which McIntyre Engla..d would ship the product or machine directly to a customer in another state based upon McIntyre America's request?

MR. GOOBY: To the best of my knowledge, that did not happen, Your Honor. With respect to the equipment that's at issue — the type of equipment that's at issue here, there might be certain types of equipment that the company makes that necessarily have to be installed at the location, so they come in parts and have to be built there, so — but that's a totally unrelated type of equipment. That's an aluminum extract — extruding machine or something of that nature. This is a shear machine, and all the shear machines in similar type products were sold only to the — to the distributor and then resold into the United States.

THE COURT: Just one other question, Chief.

You had indicated in your opening that if a customer had gone to the Las Vegas show from New Jersey and had purchased the machine at the show, there would be jurisdiction in New Jersey.

MR. GOOBY: I think —

THE COURT: Did I understand you correctly?

MR. GOOBY: I think it would be very hard to argue that under Justice Brennan's view in *Asahi* — because his — his rationale is that awareness or knowledge of the product being marketed in the forum state, if you get an order at the show and the guy says, I'm from New Jersey, send it to me in New Jersey, I think that's knowledge of the product being marketed in New Jersey.

THE COURT: But isn't that —

MR. GOOBY: But that's not Justice O'Connor's view.

THE COURT: Isn't that the knowledge of McIntyre Ohio and not McIntyre England at that juncture?

MR. GOOBY: I think there's evidence in the record that JMM had individuals at the trade show as well, so to the extent that they were aware of communications with potential U.S. customers and information that those customers were providing, I don't know exactly, but I'll assume for the sake of this presentation that they would have been aware of that fact.

THE COURT: And while I said one more, Chief. Insofar as hardship or unfairness to JM (sic) England, is there a difference whether the case is heard in Ohio or New Jersey?

MR. GOOBY: I don't believe so, Your Honor, but I think what Your Honor is focusing on is the second prong of the minimum — of the personal jurisdiction analysis, minimum contacts and then traditional notions of fair play and substantial justice, and my view of that second prong is it's sort of a qualitative analysis of the contacts, so you have to have contacts, first, to get to the second prong to determine whether or not there are sufficiently valid contacts to have a court in New Jersey, for example, exercise personal jurisdiction. So —

THE COURT: All right. Thank you.

CHIEF JUSTICE RABNER: Is there anything you'd like to add?

MR. GOOBY: That's all for now. Thank you, Your Honor.

CHIEF JUSTICE RABNER: Thank you. Mr. Ross?

MR. ROSS: Thank you, Judge.

Good morning, Your Honors. I'm here to inform the Court that there has been a dramatic increase in the globalization of commerce to the point that it is commonplace for toys and food and pharmaceutical products or ingredients to be manufactured in China or India and shipped to a distributor in America to be sold throughout the United States causing injury or harm to citizens from Maine to California, as well as New Jersey. Is the toy maker, food, or pharmaceutical

provider free of liability for poisoning a New Jersey citizen because it used a distributor? If you are taken to an emergency room at night it is common for your X-ray or diagnostic test to be sent electronically to a doctor in India to be read and analyzed. If the report is shipped to a clearing house or distributor in Ohio, who, in turn, ships it to India, who then responds to Ohio, has the Indian doctor evaded liability for potential malpractice because he used a distributor? And, finally, if you work in a factory in New Jersey it is likely that the tools and machines you are — you are using are manufactured in Mexico, Italy, Brazil, Germany, or, in this case, Britain, and may very well only contain safety standards acceptable in those countries, if any, but not in the United States or in New Jersey. Is the manufacturer free of liability for a catastrophic injury because it used an Ohio distributor?

These countries should not be permitted to export their potentially dangerous or defective products to the United States with immunity from liability by the simple strategy of using a distributor, whether independent or controlled, which may very well be financially irresponsible, as in this case. Otherwise we are permitting an end run around our very carefully constructed safety standards, which have developed over decades of careful consideration and testing.

I'm here to report to you that the state of the law is lagging behind the state of modern global commercial reality. As Your Honor stated, it's been over 20 years since *Asahi* was decided and more than 23 years since

Charles Gendler was decided. It is almost as if the airplane has been invented, but the law refuses to acknowledge that a product can be in Britain in the morning and in New Jersey in the evening and yet legally there is no liability on the British company for this product so long as it was shipped from Britain through a distributor in Ohio or anywhere else and then into New Jersey.

In this case the defendant, J. McIntyre Machinery, a British company, created and controlled a distribution scheme for the sale of its machines to potential customers anywhere in the exclusive sales territory of its exclusive distributor, the defunct McIntyre Machinery of America, and that territory included New Jersey. In other words, the defendant, J. McIntyre Machinery, purposely availed itself of the privilege of conducting activities in the entire American market, including New Jersey, the forum state, even bragging about how its sales have rocketed in the USA. J. McIntyre Machinery still uses that line on its website today. In fact, if you would go on its website, you would hear — you would see a map of the entire world and it would say, we supply equipment worldwide from our base in Nottingham, England. We also have local sales and support agents in many countries. For details of your nearest agent, please click on the map above, or, alternatively, contact us directly. In short, J. McIntyre Machinery seeks to sell its machine everywhere and yet avoid liability anywhere by manipulating American due process rules by the simple expedient of using an American distributor.

Appendix JJ

Now this Court previously dealt with this situation in the *Charles Gendler* case, and I heard what Justice Rivera-Soto said earlier, but I beg to differ, and I quote from *Charles Gendler* at page 477. It says:

> "We now adopt the stream of commerce theory as a basis for asserting personal jurisdiction over a nonresident defendant."
>
> And what else did our Supreme Court say in *Gendler*? It said:
>
> "To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by these middlemen would be to permit a legal technicality to subvert justice and economic reality in the worst sense. Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products."

That's exactly what we have here, and you heard it this morning. We don't know where the product goes. Well, they know. They know it's sent to the — it's marketed in the entire country and also in the State of New Jersey.

The Appellate Division also quoted from a very important Arizona case called *Uberti*, involving a gun which was shipped — which was manufactured in Italy,

shipped to an Italian middleman, and then from that middleman to another middleman in the United States.

> "If the defendant's argument was to be accepted by the Court, then no individual state could assert jurisdiction over defendant simply because defendant did not target a particular state or group of states, but instead intended to sell its product to all of America. This argument turns common sense on its head, holding that a defendant intending to sell its products to any and all citizens of the United States could not be held accountable in any jurisdiction where the products cause injury defies any sensible concept of due process."

THE COURT: Do you see no difference between the exportation of a firearm and the exportation of a piece of machinery?

MR. ROSS: For purpose of this argument, there is no difference. The firearm was dangerously defective. It was not — the manufacturer was not sued because someone was shot by a gun, but because the gun itself was defective and either exploded or something went wrong with the gun the way it was designed, and, therefore, the person was injured, I believe was killed in that case. So in point of fact, there really is no difference. The same thing is true in our case. We have a machine and we have an expert report, and I think it's part of my appendix, which our expert says it was

dangerously defective, and Mr. Nicastro lost his right hand because of that machine.

THE COURT: I understand you have an expert report and you put it in your appendix, but was that before the trial court?

MR. ROSS: Yes. Oh, yes.

THE COURT: The expert report?

MR. ROSS: Yes. Yes, indeed it was. It was definitely before the trial court.

If I may continue?

Finally, the Appellate Division in our case, *Nicastro*, says:

> "Due process should not provide a safe harbor allowing alien corporations to ship potentially dangerous products to the United States driving American manufacturers out of business, while allowing the alien companies to produce with immunity dangerous products for distribution in this country."

Frankly, if the Court adopts the defendant's — the petitioner's argument, a foreign manufacturer need not put any guard on any machine. It will be cheaper, it will be sold more often, and drive out the manufacturers of machines that have guards and obey our regulatory

safety laws. Courts in New Jersey and elsewhere have recognized this problem and not permitted foreign manufacturers to escape liability.

I'm asking this Court to seize the opportunity to make a general declaration that if a product from a foreign manufacturer injures a person in New Jersey, there is jurisdiction in the courts of New Jersey if the United States is the likely or intended market. In other words, if it is foreseeable that the product would wind up in the United States and New Jersey. If that is asking too much, I would ask this Court to find that a foreign manufacturer which creates or controls a distribution scheme, as it was in this case, a distribution scheme in the United States which results in a product harming a person in New Jersey or a New Jersey citizen, it is subject to personal jurisdiction.

THE COURT: How did they control the distribution scheme?

MR. ROSS: Well, with the emails that were obtained during jurisdictional discovery, there are various letters and faxes and emails that indicate that they control the amount of the commission, they control the pricing.

THE COURT: Those are all post-event.

MR. ROSS: But this was all —

THE COURT: There was nothing pre-event.

MR. ROSS: As the Appellate Division said, that creates a reasonable inference that that's the way that this was conducted at the time. It's with that same entity, McIntyre Machine. There's no evidence that their relationship changed in any way from 1994, 1995 when Mr. Curcio, Mr. Nicastro's employer, visited them until those emails were created in the late '90s.

THE COURT: But —

CHIEF JUSTICE RABNER: Is there anything in the record that suggests the relationship was exactly the same?

MR. ROSS: There is no — there is no evidence to indicate that it was any different, Your Honor, and, frankly, they both attended —

THE COURT: You didn't answer the Chief Justice's question.

MR. ROSS: Pardon?

THE COURT: You didn't answer the Chief Justice's question.

MR. ROSS: I would say that the evidence in the record that indicates that is the way that this machine was purchased by Mr. Curcio. He attended a convention in Las Vegas, Nevada at which JMM, the British company, and MMA, the Ohio company, were — shared an exhibitor's booth. Mr. Curcio went there. Frankly, I

think under our traditional minimum contacts analysis, that that is the isolated act. That's enough. Mr. Curcio went there. He saw that there was a British company there and the Ohio company there. He looked at the machine. He observed the machine. He decided then and there that he wanted to purchase the machine. They deliberately lured someone from New Jersey and someone from New Jersey decided to purchase the machine after seeing it at that convention. So, frankly, I think under even traditional minimum contacts, that that is — that isolated act is enough under a specific jurisdiction situation, as we have here.

THE COURT: Was it advertised, the convention?

MR. ROSS: Well, there was a booth, and I'm sure Your Honors have —

THE COURT: No. I know there's a booth in Las Vegas. Did they advertise across the United States, including New Jersey, that there would be a convention at which such products would be sold or exhibited?

MR. ROSS: I think the way it works is that the convention was controlled by an organization called the Institute of Recycling Industries and at that point people such as Mr. Curcio, Mr. Nicastro's employer, would naturally go to that convention to see what's the latest tools and machines that they could possibly purchase, and to that extent —

THE COURT: I think the — I think the question has to do with your use of the phrase "they." They lured people from New Jersey to Las Vegas and then tried to hide behind a distributor. So I think the question went to, is there something to support the use of the verb "lure?"

MR. ROSS: I think I used the word "lured" because of the fact that they had a booth. They obviously, J. McIntyre, the British company —

THE COURT: No. That means they were there.

MR. ROSS: They were there.

THE COURT: The question is —

MR. ROSS: And they intended —

THE COURT: The question is —

MR. ROSS: Uh-huh.

THE COURT: — is there anything in the record that supports the suggestion that Mr. Curcio, sitting in New Jersey, was invited there by them —

MR. ROSS: I think he —

THE COURT: — enticed there by them, aware that they were going to be there, or is it some more general trade show he happened to show up at?

MR. ROSS: I think the latter is correct, that it was a general trade show and that there were many booths there, many exhibitors, as is seen from some of the other —

THE COURT: And under your theory, any one of them — any one of them if their product in some way, shape, or form ends up in New Jersey is subject to jurisdiction here.

MR. ROSS: Especially in this case —

THE COURT: Any one of them.

MR. ROSS: Yes. Yes, Your Honor.

THE COURT: Thank you.

MR. ROSS: The answer is yes. That's my answer. And the fact of the matter is that the British company knew that it was marketing itself to anyone who would show up at this convention, whether they were from New Jersey or Florida or California, and they did not exclude New Jerseyans and say, well, we're not selling you any — any machines to New Jersey because your laws there are just — just too strict and we don't like it. They —

THE COURT: And what if they do that? What if they put a sign in front of their booth saying, New Jersey need not apply?

MR. ROSS: But if New Jersey does apply and they sell to New Jersey, then they're still on the hook.

THE COURT: So if New Jersey need not apply, later on Curcio, as he did here, buys from the Ohio company, you're still on the hook.

MR. ROSS: I would say yes.

THE COURT: They're still on the hook. Sorry.

MR. ROSS: I would say absolutely yes, the British company would still be on the hook because the machine has found its way into New Jersey and cause harm to someone in New Jersey by the deliberate distribution scheme of the British company. They controlled this Ohio company. There were letters and emails and faxes talking about pricing, talking about commissions. On one occasion I saw the Ohio company took a commission before —

THE COURT: So what if the Ohio company says to Curcio, sorry, we can't sell it to you, but how about if we sell it to somebody in Pennsylvania and you just truck it over yourself and it ends up in New Jersey? Is McIntyre England still subject to our jurisdiction under your theory?

MR. ROSS: Yes. Yes, I would say so because the New Jersey —

THE COURT: So there's nothing they can do — once they show up at a trade show, nothing they can do to avoid New Jersey jurisdiction.

MR. ROSS: They can stop selling a dangerous machine. That would avoid —

THE COURT: Well, no, no, no. This has nothing to do with whether the machine is dangerous or not dangerous. This has to do with jurisdiction. Whether or not the machine is dangerous has nothing to do with jurisdiction. We don't have different rules for, oh, there's jurisdiction because someone got hurt. We don't have different rules for, oh, there's jurisdiction because it's dangerous. We have jurisdiction, we have due process, and under your theory, nothing they can do to prevent it. Once they show up at the trade show, nothing they can do to prevent being subject to the jurisdiction here in New Jersey.

MR. ROSS: I think that's one aspect of the cases. Yes, Your Honor. I would say that's true. That would be —

THE COURT: Why do you have to take — why do you have to take that position? Because it — because McIntyre went to the trade show with the intention of selling its products.

MR. ROSS: That's correct.

THE COURT: They didn't care where they were sold, as long as they were sold.

MR. ROSS: I agree.

THE COURT: Correct?

MR. ROSS: I agree 100 percent. They did not care. They could be sold to anybody anywhere in the United States. That was their goal. That's the reason they were at —

THE COURT: They didn't know who was going to show up at their booth. It could have been someone from Pennsylvania, someone from Alabama, someone from New Jersey, and they were all too happy to sell to anyone.

MR. ROSS: That's right, and the point I'm — Your Honor is correct. New Jersey was not excluded so that's — that hypothetical really is not the case in this particular situation.

THE COURT: But how do you get from that conclusion to saying that someone has purposely availed themselves of the benefits of law of this forum?

MR. ROSS: Exactly, Your Honor, because they created the distribution scheme. The British company selected a New — an American distributor to sell throughout the United States and appointed that distributor as its exclusive distributor, and that — the purpose of appointing that exclusive distributor was to sell throughout the United States. It was their scheme that they created. They controlled the inventory, the pricing, everything.

THE COURT: But they — but they sold the equipment to this so called distributor.

MR. ROSS: Yes. And —

THE COURT: And then the sales – the sales within the United States were exclusively the province of that distributor.

MR. ROSS: And that's —

THE COURT: JMM England had nothing to do with them.

MR. ROSS: I disagree, Your Honor. I think JMM had everything to do with it, although you are correct.

THE COURT: How?

MR. ROSS: In that the actual transfer was from Ohio to New Jersey or Maine or California or Pennsylvania.

THE COURT: How did JMM England have anything to do with any of the sales that JMM Ohio engaged in?

MR. ROSS: Your Honor, because these machines, these large industrial machines, were built on a per-order basis, so once the order came in —

THE COURT: By somebody in Ohio who was not disclosing, I need you to build this machine for me because I'm going to sell it to somebody in New Jersey or to somebody in Kentucky. All they said was, here is

an order, deliver it to me in Ohio, and it was delivered to them in Ohio, at which point JMM Ohio shipped it to New Jersey.

MR. ROSS: That's correct, Your Honor, but —

THE COURT: In the meanwhile, the people in England didn't have a clue that this machine was going from Ohio to New Jersey. It probably would have cost less in the way of — I would think in the way of shipping costs to ship it directly to New Jersey. Now why do you think they would engage in higher expenses?

MR. ROSS: Your Honor, I think the actual — the British company knew that the machines were not all winding up in Ohio because they selected the Ohio distributor for the entire North American continent.

THE COURT: They knew that they were reselling them.

MR. ROSS: Yes.

THE COURT: Of course, they did.

MR. ROSS: Yes.

THE COURT: But how did they know they were selling them to New Jersey? How is that purposeful availment?

MR. ROSS: Because of creating the agent which had control over the New Jersey market. That's the way there's the purposeful availment.

THE COURT: And they didn't care, as long as it was sold in the United States.

MR. ROSS: That's correct, Your Honor.

THE COURT: But your

THE COURT: And they may very well have thought through this middleman scenario that they would be insulating themselves —

MR. ROSS: Exactly.

THE COURT: — from liability, which is the very point that our *Gendler* opinion was — was trying to flesh out.

MR. ROSS: I agree completely, Your Honor. I think that what the defense here, the petitioner asks for is a roadmap for farm manufacturers on how to dump their unsafe products in the United States with impunity.

THE COURT: You know, Counsel, you keep jumping on unsafe and defective. This is a jurisdiction case.

MR. ROSS: Yes.

THE COURT: There has been no proof that this

machine is unsafe, that this machine is defective. You've got allegations in your complaint, that's all, and I suggest to you, Counsel, that adding red herrings to your argument is not advancing your cause.

MR. ROSS: Well, I — Your Honor, I am trying not to add any red herring, but the point — the reason why I'm here is because someone was injured and because we allege that the machine was defective.

THE COURT: Well, I sure hope so because otherwise you would have some real serious problems.

MR. ROSS: That's right, Your Honor.

THE COURT: You're alleging that someone has been injured as the result of the negligence of somebody else.

MR. ROSS: That's correct.

THE COURT: But at this point in these proceedings, it's just that —

MR. ROSS: Yes.

THE COURT: — an allegation.

MR. ROSS: Yes.

THE COURT: Well, it may be allegations, but for the purposes of these arguments, we can accept those

allegations as being true. We don't have to ignore what this case is about.

MR. ROSS: That's exactly what I —

THE COURT: This is a product liability case.

MR. ROSS: That's exactly what I was going to say, Your Honor. This was on a motion to dismiss, and I believe that the facts have to be accepted as alleged —

THE COURT: Counsel, it's a motion to dismiss for want of jurisdiction.

MR. ROSS: That's correct. That's correct, and we are —

THE COURT: It's not a motion to dismiss for failure to state a claim. Want of jurisdiction. To some of us that means something.

MR. ROSS: Yes. It means — it means a lot to me and it means a lot to my client as well, Your Honor.

THE COURT: Counsel, let me ask you this.

MR. ROSS: Yeah.

THE COURT: Consistent with fundamental notions of fairness and due process —

MR. ROSS: Yes.

THE COURT: — and this notion that someone has to do something in order to be hauled into a jurisdiction — and I understand that your theory is that the British company, by using a trade show, working through an exclusive distributor, in some fashion has made itself amenable to jurisdiction all over the United States simply because they are working through a distributor. Is that a fair summary of what you're saying? It doesn't —

MR. ROSS: Yes, it is, Your Honor, with the extra component that the British company controlled the distributor, controlled the distributor and said to it, this is how much you're going to charge for the machine, this is the amount of your commissions, this is how much inventory we want you to have, you are not allowed to take a commission until we get paid for the product. So, frankly, this is more of a consignment kind of deal, frankly, where the Ohio company gets paid after the British company gets paid. This was total complete control of this product sales in the United States by this British company, and they have cleverly used a distributor to avoid liability.

THE COURT: Now my question was exactly to that last point, and that is this. Consistent with notions of due process then, shouldn't we require some level of proof that there was an intention to limit liability in the United States or limit jurisdiction in the United States by the mechanism that they chose to operate through? Do you understand what I'm asking you?

MR. ROSS: Yes. You mean intent on the part of the British manufacturer?

THE COURT: Yes.

MR. ROSS: I have that intent in the appendix, Your Honor.

THE COURT: So that if we were to fashion a rule that said simply showing up at a trade show and — and using a distributor may not be enough, but when you do that, coupled with control of the distributor, coupled with an intentional effort to limit jurisdiction notwithstanding wherever the products might go, that would be an acceptable rule for you.

MR. ROSS: Yes. Yes. I think that falls within the category of what's known as stream of commerce plus, and we think, at the very least, we have that in this case, Your Honor, based upon that. We think there is more here than simply that, but, at the very least, we do have that.

If I may, Your Honor, the other half of the argument, of course, is where else could Mr. Nicastro bring this case? Once we establish through minimum contacts that there is jurisdiction here, then the other half of it is whether there's fair play and substantial justice, as far as the defendant is concerned. The burden is on them to show that there is not. Here New Jersey law will apply because the injury was in New Jersey. The machine is in New Jersey. The witnesses are in New Jersey. The

doctors who tried to repair Mr. Nicastro's hand are in New Jersey. The expert witnesses are in New Jersey. Everything is in New Jersey. The Workers' Compo benefits that were paid to Mr. Nicastro, which are —

THE COURT: That's not jurisdiction. That's *forum non conveniens* you're arguing.

MR. ROSS: Yes. And, Your Honor, I would challenge any other state in the United States to be a better forum for this litigation other than the State of New Jersey. Any other state would be a *forum non conveniens* truly.

THE COURT: With all the provincial pride I have I agree with you, but that doesn't make it constitutional.

MR. ROSS: Well, it does, Your Honor, because otherwise Mr. Nicastro is, frankly, out of court.

THE COURT: Why?

MR. ROSS: The -- the Ohio —

THE COURT: Why can't he go to Ohio?

MR. ROSS: The Ohio manufacturer is defunct. It no longer exists. Chapter 7, gone.

THE COURT: I understand that, but you heard counsel, essentially, concede that he has no jurisdictional defense to this action brought in Ohio.

MR. ROSS: And the Ohio Court — the first thing the Ohio Court would say, there may be jurisdiction here, counsel, but it's *forum non conveniens*. There is nothing here in — in Ohio that happened with regard to this case —

THE COURT: Well.

MR. ROSS: — other than the machine —

THE COURT: The one who would bring —

MR. ROSS: — was briefly sold —

THE COURT: Excuse me.

MR. ROSS: Yes.

THE COURT: The one who would bring the *forum non conveniens* motion would be the defendant, not the plaintiff.

MR. ROSS: Yes.

THE COURT: Right?

MR. ROSS: It would be them. Yes, Your Honor.

THE COURT: Okay. Do you think they would go and say, oh, this is inconvenient because all these witnesses are in New Jersey?

MR. ROSS: I think —

THE COURT: Do you really think they're going to say that?

MR. ROSS: I think they would say whatever it would take to get the case thrown out of court in Ohio, and a *forum non conveniens* would do it. That would be their argument.

THE COURT: Well.

MR. ROSS: And that's why defendants bring those arguments, Your Honor.

THE COURT: They may do that and then it gets thrown out there and you end up back here because they said it's more convenient here and now they're judicially estopped. You may end up exactly where you want to be.

MR. ROSS: Yeah. I – in all due –

THE COURT: If they are silly enough to make that argument. I don't think they are, by the way.

MR. ROSS: In all due candor, Your Honor —

THE COURT: Well, they won't wind up back

MR. ROSS: — I think we have a —

THE COURT: They won't wind up back here if we say there's no jurisdiction. They'll wind up nowhere.

MR. ROSS: That's correct. I'll be just out of court and that will be the end of it, so that just, frankly —

THE COURT: Do you really think that would be the result?

MR. ROSS: Absolutely. Absolutely, because you would say, can't do it in New Jersey, the Ohio court said, wrong — wrong forum for you, and otherwise that would be the end of the case, frankly.

You know, in this case I think there is no doubt that we have established that stream of commerce plus has occurred. Even in the *Asahi* case it said that if there is a distributor created by the manufacturer who is designed to sell the product in the forum state, then there is jurisdiction even under that stream of commerce plus. Of course, Justice Brennan went further than that and said that if someone is injured in this state by virtue of the intentional conduct of the British manufacturer in shipping the product and it results in an injury, then there is jurisdiction here, and, of course, we all remember that Justice Brennan was — was one of our own here. But the fact remains that we have enough stream of commerce plus to have jurisdiction in this case, otherwise Mr. Nicastro is out of court. There is nowhere else for him to go that makes sense, that's practical, and that also has jurisdiction, and these companies, whether they're food processors or toy manufacturers, they intend to ship throughout the United States and they can cause harm throughout the United States, as it did in this particular case. If they

use an impecunious distributor, then the injured party should not be out of court, especially when they intend to market the entire United States, which happened here.

CHIEF JUSTICE RABNER: Thank you, Mr. Ross.

MR. ROSS: Thank you.

CHIEF JUSTICE RABNER: Mr. Miller?

MR. MILLER: I would like to thank the Court for allowing me to argue briefly.

I shall support Mr. Ross, actually propose a theory that I believe will address some of the concerns and questions that have been raised by this Court; though I support Mr. Ross, I have slightly different preferences.

I respectfully request that this Court reaffirm the broadest constitutional standard for personal jurisdiction; that is, stream of commerce, as was set forth in *Worldwide Volkswagen*, and as adopted, I believe respectfully, by this Court in *Charles Gendler*. And by saying that I believe I address a concern, what happens if somebody excludes New Jersey? In *Worldwide Volkswagen* the Court said New Jersey could be excluded, and they also said that the foreign manufacturer could get liability insurance, which was another comment here dealing with fairness.

Now this standard, which is stream of commerce, as opposed to stream of commerce plus, I believe may be

better phrased as stream of commerce, dash, market or, dash, intended market, because I believe when you look at *Worldwide Volkswagen* and *Charles Gendler* it's clear that the intended market was a key to the stream of commerce and that's an additional requirement.

There have been three different —

THE COURT: I'm sorry, Counsel. But is your intended market iteration different from the actual market served iteration that's in your brief?

MR. MILLER: No. It's the same thing.

THE COURT: Okay. So it's just different words, but for the same thing.

MR. MILLER: Yes, Your Honor.

THE COURT: Intended and served.

MR. MILLER: Yes. There have been three ways of phrasing limits on the stream of commerce, and I believe when you look at all of them, they all can be seen as ways of talking about the market, limiting it to the market. One way of limiting stream of commerce is that it does not apply — jurisdiction does not apply if there's a fortuitous or isolated sale. That can be seen as a sale outside the stream of commerce or taking it — rather, outside the market or taking it outside the market.

Another limitation is that, well, the product ended up here by the unilateral activities of the plaintiff,

particularly in *Worldwide Volkswagen* they drove to Oklahoma. That, again, could be seen as outside the market.

And a third limit is that, is it fair for a defendant to reasonably anticipate being hailed into court here in New Jersey. Well, if the market is in New Jersey, then it's fair. If the market is not in New Jersey, then it's not fair.

Now this, of course, is the first part of a personal jurisdiction test. The second part, the standard part, is still the part that has to be met, and that is the policy argument that it — that jurisdiction not offend traditional notions of fair play and substantial justice.

The reasons why I ask for this broadest theory are two. First of all, we want it to be as fair as constitutionally possible for New Jersey residents to recover from everyone who has responsibility for the product that caused the injury. Secondly, this will bring to the table, if by jurisdiction, all who are responsible, from distributors right back up to manufacturers, and that will allow for a fairer allocation of ultimate liability, so that, for example, the small New Jersey distributor, if there is one, is not left holding the whole liability bag while the big rich foreign manufacturer escapes.

This comment was really taken from this Court's decision in *Newmark v. Gimbel's*. As I quoted in the brief, that the Court suggested it's to the interest of the distributor to bring in the manufacturer.

This also is to the benefit of the U.S. distributor, as occurred in this case, because then the U.S. distributor is not left holding the whole liability bag while the foreign manufacturer goes away. And this occurred in the *Sortisimo* (phonetic) case that I have cited, where there was a U.S. distributor that filed a third party complaint against the foreign manufacturer. And in this regard in preparing for this argument I discovered I made an error in my brief. I apologize to the Court. I said that in *Sortisimo* the U.S. distributor, Heidelberg Eastern, was a New York corporation. In reviewing that, I see it was an error. It was a Delaware corporation. That does not affect the legal argument I made.

Perhaps one more thing to perhaps address some of Your Honors' comments is that I think that this case factually is an easy case for jurisdiction. I can imagine lots tougher cases where it would be a foreign component manufacturer, where it would be a lot tougher on the facts to try to see if they met the test I suggest you take.

Here, though, I suggest, Justice Albin, you're absolutely correct that at Page 192 of the plaintiff's appendix there is an email from the English McIntyre to the McIntyre America, to the actual defunct distributor here and they say, the English one does:

"All we wish to do is sell our products in the States, capital S."

I think that makes it clear beyond *Caville* (phonetic) that in fact they wish to sell to every state, and so we should not have to prove New Jersey in addition.

That's the end of my presentation. Are there any questions I could try to answer?

THE COURT: The three-part or three-element test that you described all focuses on the plaintiff, but at least the way I understand jurisdiction, it is largely focused on the defendant and the defendant's acts.

MR. MILLER: I agree with —

THE COURT: Where do we throw that into the mix?

MR. MILLER: I agree with Your Honor. If it came across as focus on the plaintiff, that was my error. I apologize. I did not intend to focus on the plaintiff. When you look at, is it in the stream of commerce, that's done by the defendant. Is it the intended market or the actual market served. That's from the defendant's point of view. And is it fair traditional notions of fair play and substantial justice, that's all the defendant. Now I've seen in a number of cases that at times it is fair as part of this mix to look at the plaintiff's relation to the state, and the fact that the plaintiff is a New Jersey resident I believe is a factor that may be taken into account. But clearly Your Honor is correct, the main focus has to be on the defendant.

Appendix JJ

CHIEF JUSTICE RABNER: Thank you Mr. Miller.

MR. MILLER: Thank you very much.

CHIEF JUSTICE RABNER: Mr. Gooby, brief rebuttal?

MR. GOOBY: May it please the Court? The competent evidence and undisputed facts of this case without unnecessarily resorting to any inferences from post-sale or post-accident events confirms that J. McIntyre Machinery, Limited is not subject to personal jurisdiction in New Jersey under either articulation of the stream of commerce theory from *Asahi*. Accordingly, we respectfully request that this Court affirm the Appellate Division's adoption of the stream of commerce plus rationale as the law of this State, but reverse the Appellate Division judgment, because under either O'Connor's stream of commerce plus theory or under the rationale espoused by Justice Brennan, it would be inconsistent with JMM's due process rights as a foreign defendant for the New Jersey courts to exercise personal jurisdiction in this case.

Thank you.

CHIEF JUSTICE RABNER: Thank you.

We'll take the matter under advisement. (Proceedings concluded)

Appendix JJ

CERTIFICATION

I, Diana Pawlikowski, the undersigned transcriber, do hereby certify that the following transcript of the proceedings before the New Jersey Supreme Court on January 21, 2009, Tape No. AM-A, Index Nos. 001 to 4043, is prepared in full compliance with the Transcript Format for the Judicial proceedings, and is a true and accurate compressed transcript of the proceeding.

/s/
Diana Pawlikowski, AD/T #393
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Date: 10/25/10

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED

Does a "new reality" of "a contemporary international economy" permit a state to exercise, consonant with due process limits of the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream–of–commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

LIST OF PARTIES

Petitioner J. McIntyre Machinery, Ltd. is a company organized and existing under the laws of the United Kingdom. Its principal place of business is in Nottingham, England.

Respondents Robert and Roseanne Nicastro, husband and wife, are residents of the State of New Jersey.

Defendant McIntyre Machinery America, Ltd. filed for bankruptcy in 2001, and has not participated in this action.

RULE 24.1 AND RULE 29.6 STATEMENTS

Pursuant to Supreme Court Rule 24.1, Petitioner J. McIntyre Machinery, Ltd. states that all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29.6, Petitioner is a company formed under the laws of the United Kingdom. Petitioner is not a publicly traded company and no publicly traded company owns 10% or more of Petitioner's equity.

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OPINIONS BELOW

The February 2, 2010 opinion of the Supreme Court of New Jersey is reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), and is reproduced in the Petition Appendix ("Pet. App.") at pages 1a-72a. The New Jersey Supreme Court affirmed the April 9, 2008 decision of the Superior Court of New Jersey, Appellate Division, reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super. 539, 945 A.2d 92 (App. Div. 2008). Pet. App. 73a-108a. That court reversed the unpublished November 3, 2006 decision and order of the Superior Court of New Jersey, Law Division, granting Petitioner's motion to dismiss for lack of personal jurisdiction. Pet. App. 109a-137a. In its unpublished decision dated May 26, 2005, Pet. App. 154a-157a, the New Jersey Appellate Division reversed and remanded for jurisdictional discovery the March 5, 2004 decision and order of the New Jersey Superior Court, Law Division, Pet. App. 158a-172a, granting Petitioner's first motion to dismiss for lack of personal jurisdiction.

STATEMENT OF JURISDICTION

This Court's jurisdiction is appropriate under 28 U.S.C. § 1257(a). The Supreme Court of New Jersey's opinion was rendered on February 2, 2010, and the issue of personal jurisdiction over Petitioner consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not subject to further review in the courts of the State of New Jersey. *See Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485

(1975). The Petition For a Writ of Certiorari was filed on May 3, 2010, and granted on September 28, 2010.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution, Amendment XIV, Section 1, clause 3, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This matter arises from a products liability action filed September 22, 2003, by Respondents, Robert Nicastro and his wife Roseanne in consortium, in the Superior Court of New Jersey. Respondents allege that on October 11, 2001, Mr. Nicastro was injured while using a three-ton scrap metal shear machine manufactured by Petitioner, J. McIntyre Machinery, Ltd. ("J. McIntyre") in the course of his employment with Curcio Scrap Metal, Inc. ("Curcio") in Saddle Brook, New Jersey. Joint Appendix ("JA") 5a-10a.

Mr. Nicastro received a New Jersey workers' compensation award of "nearly one-half million dollars in medical and other benefits" for his injury. Respondents' Opposition to Petition for Certiorari at 7.

The allegedly-involved shear machine was manufactured by J. McIntyre in Nottingham, England, and sold and shipped to J. McIntyre's exclusive distributor, McIntyre Machinery of America, Inc. ("MMA") in Stow, Ohio. Pet. App. 3a. In 1995, MMA sold the shear machine to Curcio and shipped it to Saddle Brook, New Jersey with an invoice that stated "F.O.B. Point Stow, OH." JA43a.

MMA was named as a defendant in this action. On or about November 29, 2001, MMA filed a Chapter 7 bankruptcy petition. JA91a. Those proceedings were closed on or about July 23, 2003, before this action was filed by Plaintiffs. JA94a. MMA is no longer operating. *Id.*

J. McIntyre is a company organized under the laws of the United Kingdom. Pet. App. 3a. Its principal place of business was in Nottingham, England. JA83a.

"J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled without any common ownership," as the New Jersey Supreme Court ruled. Pet. App. 7a. The court also held: "We do not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." Pet. App. 14a.

On December 22, 2003, J. McIntyre answered the complaint, JA12a, and then moved to dismiss it on the basis that the New Jersey court lacked personal jurisdiction over it. JA18a. On March 5, 2004, the trial court granted J. McIntyre's motion and dismissed the

complaint, finding that J. McIntyre did not have sufficient contacts with New Jersey to justify its exercise of jurisdiction. Pet. App. 159a, 172a. The trial court held that under even the most liberal accepted application of the stream-of-commerce branch of personal jurisdiction doctrine, J. McIntyre would not be subject to jurisdiction in New Jersey. Pet. App. 170a-171a.

Respondents appealed to the Superior Court of New Jersey, Appellate Division. On May 26, 2005, the New Jersey Appellate Division opted not to decide the issue of jurisdiction, and remanded the case to the trial court for jurisdictional discovery. Pet. App. 156a-157a.

On September 11, 2006, after the completion of jurisdictional discovery, J. McIntyre again moved to dismiss the complaint for lack of personal jurisdiction. JA80a. On November 3, 2006, the trial court granted J. McIntyre's motion and again dismissed Respondents' complaint for lack of personal jurisdiction. Pet. App. 110a. The trial court ruled that J. McIntyre was not subject to personal jurisdiction in New Jersey because there was no basis to conclude that it had any expectation that one of its products would be sold and shipped to New Jersey. *Id.*

Respondents again appealed to the New Jersey Superior Court, Appellate Division. On April 9, 2008, the Appellate Division reversed the trial court's decision, holding that jurisdiction over J. McIntyre was proper under the test articulated by Associate Justice Sandra Day O'Connor in her concurring opinion in *Asahi Metal Industry Co., Ltd.. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (O'Connor, J., concurring), because:

(1) J. McIntyre does business in the United States through a single distributor; and (2) New Jersey is one of the United States and, thus, a possible location for end users of its products. J. McIntyre timely petitioned the Supreme Court of New Jersey for review by certification.

On February 2, 2010, a five-justice majority of the New Jersey Supreme Court affirmed the Appellate Division's finding of personal jurisdiction. In a decision that begins with the statement, "Today, all the world is a market," the court rejected both pluralities' treatments of the stream-of-commerce branch of personal jurisdiction doctrine in *Asahi*, and "discarded" this Court's jurisdictional jurisprudence of minimum contacts and purposeful availment as "outmoded constructs" that no longer obtained in the supposedly new world market. Pet. App. 35a.

The "new reality" discovered by the New Jersey Supreme Court that is supposedly "driven by startling advances in transportation of products and people and instantaneous dissemination of information," Pet. App. 14a-15a, was, according to the New Jersey Supreme Court, presciently anticipated by its own decision issued nearly a quarter century ago in *Charles Gendler & Co. v. Telecom Equip. Co.*, 102 N.J. 460, 508 A.2d 1127 (1986).

The New Jersey Supreme Court held that because J. McIntyre sold products in the United States generally through a single, unaffiliated distributor located in Ohio, it "targeted" the entire United States, including New Jersey. Pet. App. 39a-40a. The court

further ruled that by targeting "the United States market for the sale of its recycling products," J. McIntyre knew or reasonably should have known that this "distribution scheme" could "make its products available to New Jersey consumers." *Id.* at 40a. That is enough, held the court, to allow New Jersey courts to exercise jurisdiction over foreign defendants without violating the Due Process Clause of the United States Constitution. *Id.* at 40a-42a. In making this determination, the court cited New Jersey's "paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace." *Id.* at 34a.

The court also identified another purported interest of New Jersey. Wading into an area of national public policy, to wit, offshore outsourcing, the court stated: "It would be strange indeed if a New Jersey manufacturer that makes a defective and dangerous product . . . would be able to move its plant to a foreign land and peddle [*sic*] its wares through an independent distributor across the nation . . . and suddenly become beyond the reach of one of our injured citizens through this State's legal system." *Id.* at 35a.

Continuing its foray into considerations of our proper relations with other countries, the court opined: "It would be unreasonable to expect that plaintiff's only form of relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law." *Id.* at 41a-42a. Targeting for special concern the "globalization of commerce" and the actions of foreign manufacturers marketing "their products through distribution systems

that bring those products into this State," the court announced in language suggesting trade restrictions on the international business community, that this "privilege" comes with an attorning to the power of New Jersey courts. *Id.* at 42a. The case was remanded to the trial court for further proceedings. *Id.* at 43a.

On April 22, 2009, J. McIntyre filed for Administration in the United Kingdom under the Insolvency Act 1986 and is presently in liquidation proceedings. Though Respondents and the New Jersey Supreme Court had previously decried the notion of having to seek redress against J. McIntyre in the United Kingdom, Respondents have filed proofs of unliquidated monetary claims in those very proceedings. *See* Respondent's Opposition to Petition for Certiorari at 6. Respondents' claims against J. McIntyre in the United Kingdom remain pending, and dissolution of the company has not yet occurred.

SUMMARY OF THE ARGUMENT

In a rejection of this Court's jurisprudence as consisting of "outmoded constructs of jurisdiction," the Supreme Court of New Jersey held that, in light of a purported "radical transformation of today's global market," a producer anywhere in the world is now subject to *in personam* jurisdiction in a products liability action in New Jersey state court under the stream-of-commerce branch of the personal jurisdiction doctrine if that defendant targets the United States "market" for the sale of its products and just one is purchased by a New Jersey consumer. Pet. App. 35a.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), this Court, in separate pluralities considering the application of the stream-of-commerce branch of *in personam* jurisdiction, kept the constitutional touchstone of requiring a defendant to have minimum contacts with a forum state, whether through conduct directed at the forum state or actual awareness of a distribution system that brings its products into the forum state's territory, before a court may exercise jurisdiction over the defendant.

The New Jersey Supreme Court disregarded *Asahi* and its obligation under the Constitution to apply the jurisdictional rules established by this Court. The New Jersey Supreme Court's decision to "discard" this Court's jurisprudence cannot be justified under the Supremacy Clause, U.S. Const., Art. VI, Sec. 1, cl. 2, and Article III of the Constitution; nor can that court's new rule be squared with a foreign defendant's due process rights under the Constitution. Both of these constitutional errors can be traced to a common root: a failure to appreciate the limits on the role of the states in our federal system.

Even as courts in the early years of our Nation under the Constitution struggled with the deference that one state owed to another under the Full Faith and Credit Clause, U.S. Const., Art. IV, Sec. 1, it was recognized that a rendering state court's adjudicative authority was constrained to its territorial jurisdiction. This Court has located the right of a putative defendant to be free from the illegitimate exercise of state court power in the Due Process Clause of the Fourteenth Amendment, grounding it in territorial limits. Territorial

jurisdiction allows the various states to enforce their laws without reaching beyond the limits imposed on them as coequal sovereigns in the federal system. It also assures that nonresidents are given fair notice of what is required of them to be free from the unfair assertion of judicial authority. This restriction on state sovereign power is a function of individual liberty protected by the Due Process Clause.

This Court no longer requires that a person be "present" for the exercise of state court jurisdiction. Yet, this Court's jurisprudence can be understood as the search for an appropriate surrogate for presence, one that can define the due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders.

The minimum contacts test serves that purpose. As developed by this Court from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to the present, the test includes a requirement that the person over which a state seeks to exercise sovereignty has taken a deliberate and concrete act directed to the forum state that creates a substantial connection with that state.

The New Jersey Supreme Court refused to apply the jurisprudence of this Court so that it could provide a New Jersey forum for every New Jerseyan injured by a product sold there, whatever the cost to the United States Constitution and to the conduct of foreign relations by the federal government. It saw fit to make irrelevant minimum contacts; this Court has never done so. The New Jersey Supreme Court went so far as to eliminate from its jurisdictional calculus any need for

the putative defendant to be aware of the forum state, something this Court has never even considered. Under the concurring opinions in *Asahi* of both Justice O'Connor and Associate Justice William J. Brennan, Jr., minimum contacts must exist for a state court to exercise *in personam* jurisdiction over a putative defendant who is a nonresident of the state. Because, as found by the New Jersey Supreme Court, Petitioner had no minimum contacts with New Jersey, the judgment is inconsistent with the Constitution.

The New Jersey Supreme Court offered policy reasons to support its decision to adopt an entirely new jurisprudence for personal jurisdiction. Each is irrelevant: absent minimum contacts, there is no jurisdiction.

The "new realities" of global commerce that the New Jersey Supreme Court discovered not only do not support the new rule it adopted, but those so-called realities would have existed nearly a quarter-century ago at the time *Asahi* was decided. Further, global commerce as it is now conducted argues against the adoption of the New Jersey Supreme Court's holding. Global commerce depends upon comity among sovereign states and the web of bilateral and multi-lateral arrangements that has been spun during the post-World War II period. The New Jersey Supreme Court has determined to solve what it considers to be the unfairness of global trade by requiring every foreign company whose goods are sold into New Jersey to be held accountable to a New Jersey court even though a foreign court would be available because it would be "unreasonable" to reach any other result. That is not the business of New Jersey; it is the business of the United States.

The explication by Justice O'Connor in her concurring opinion in *Asahi* is consistent with this Court's jurisprudence. That jurisprudence requires that before *in personam* jurisdiction attaches, the nonresident putative defendant must purposefully establish by its own actions minimum contacts in the forum state; mere thought is insufficient. Justice Brennan's concurrence employs this Court's case law much more sparingly and departs from the plain meaning of the language adopted by this Court.

Justice Brennan's thought-based test also does not adequately protect the fair notice interests of an economic actor and its right to conform its actions to avoid a state's exercise of jurisdiction. Justice O'Connor's restatement of the principles that form the rule of law set forth by this Court does provide certainty. Over the years, and in application by lower courts, this Court's traditional jurisprudence in this area has proven remarkably supple in responding to changing economic circumstances. There is no reason to discard that jurisprudence based upon a transformation of global commerce that occurred decades ago.

Other state courts have seen an opening by means of Justice Brennan's concurring opinion to find constructive knowledge where actual knowledge did not exist. This Court can re-affirm the rule of minimum contacts, setting forth a jurisdictional rule that in itself ensures fair play and substantial justice, without the need for a bifurcated test that relies on the subjective assessment by individual judges, and thereby preserve the rights of putative defendants and place appropriate constraints on the power of the individual states.

Here, because the New Jersey Supreme Court held that Petitioner lacked minimum contacts, the judgment should be reversed.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT LACKS THE POWER TO DISCARD THIS COURT'S JURISDICTION JURISPRUDENCE.

The decision below admits of many defects, not least of which is its exercise of a supposed power to "discard" this Court's jurisdiction jurisprudence as "outmoded." The New Jersey Supreme Court demonstrated thereby its contempt for the founding principle that this Court is the ultimate source for the meaning of the United States Constitution and that state courts and federal courts are bound by those rulings. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). The court held that it had jurisdiction over a defendant that lacked minimum contacts with New Jersey, even though minimum contacts have been at the core of this Court's jurisprudence for 65 years, from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), through and including both pluralities in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

Once the New Jersey Supreme Court concluded, correctly, that no minimum contacts existed, it was bound under the Constitution to affirm the trial court's determination that New Jersey cannot exercise *in personam* jurisdiction and let J. McIntyre return home to England. Instead, by opting to exercise jurisdiction, the court not only violated its duty under the

Constitution to follow this Court's decisions, but the new rule it announced—jurisdiction obtains when a person targets the United States and a New Jersey consumer purchases a product—does violence to the jurisprudence that this Court has developed over the past 160 years, starting no later than this Court's opinion in *Pennoyer v. Neff*, 95 U.S. 714 (1850).

II. A STATE'S AUTHORITY TO EXERCISE JURISDICTION IS INEXTRICABLY BOUND TO ITS TERRITORY.

The New Jersey Supreme Court grounded New Jersey's power to act, not on any contact by a defendant with New Jersey, but rather on entry by a defendant into the territory of the United States. Sovereignty was thereby extended by New Jersey over an area that it does not and cannot control. Just as New Jersey's Supreme Court is not the Supreme Court of the United States, so, too, its demesne is not the United States.

A. The First, and Enduring, Principle of State *In Personam* Jurisdiction: Territory.

The proposition that a court lacking personal jurisdiction over a defendant may not render a valid judgment against that defendant traces back to long-standing English and American legal conventions that both precede and find eventual embodiment in the Fourteenth Amendment. *See Burnham v. Superior Court of California*, 495 U.S. 604, 608-609 (1990) (Scalia, J., concurring); *see also Bissell v. Briggs*, 9 Mass. 462, 467 (1813); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting).

Early in our history as a Nation, courts recognized that the nature of the states within a system of dual sovereignty created biases in favor of in-state litigants. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 297 (1990) (discussing Justice Story's opinion in *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134)); *cf. Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (considering the legislative jurisdiction of Texas to affect a contract entered into and performance contemplated entirely in Mexico). Justice Story's formulation of territoriality in *Picquet* was "a means to prevent states from overstepping their bounds in a federal union." Kogan, *supra*, at 297. An acceptance of sovereign power and territoriality is, and always has been, essential to a state's assertion of personal jurisdiction over a defendant. *Burnham*, 495 U.S. at 608-11 (Scalia, J., concurring). Since the inception of our federalist system, the sovereignty of each state has effected a concomitant limitation on the sovereignty of all sister states, a limitation that this Court has located in the Constitution both before and after the Fourteenth Amendment was added. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

In *Pennoyer v. Neff*, 95 U.S. 714 (1877), this Court first evaluated personal jurisdiction under the Fourteenth Amendment's Due Process Clause. Recognizing that "the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *id.* at 720, this Court held that personal jurisdiction may be exerted over a party only if that party is served with process while physically within the territory of a state, and that the

judgment of a court lacking personal jurisdiction over a defendant violated the Due Process Clause. *Id.* at 733. This Court defined due process to mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* In this Court's jurisprudence, the continuing importance of *Pennoyer* "is not its result, but the fact that its principles and corollaries derived from them became the basic elements of the constitutional doctrine governing state court jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 198-99 (1977).

B. The Minimum Contacts Test Allowed States to Exercise Adjudicative Jurisdiction Beyond their Geographic Boundaries Even as It Preserved the Territorial Limitation.

Responding to an increasingly interconnected system of trade, communication and travel in the last century and through the present, this Court deviated from strict geography in *Pennoyer*, but only with respect to suits arising from a putative defendant's intentional contacts with a state that establish thereby a substantial connection. *Burnham*, 495 U.S. at 610 (Scalia, J., concurring).

The "minimum contacts" test was first announced in *International Shoe Co.*, 326 U.S. at 316. In *International Shoe Co.*, this Court held that the courts of a state may exercise personal jurisdiction over a nonresident defendant consistent with the Due Process Clause of the Fourteenth Amendment only if the

defendant has "certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *McGee v. International Life Insurance*, 355 U.S. 220, 222-23 (1957).

The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319. Rather, there must be a showing of a voluntary, substantive connection by the foreign defendant with the state, such that the foreign defendant deliberately chose to take advantage of the "benefits and protection of the laws" of the forum state, before it can fairly be haled into court there. *Id.* In considering a forum's exercise of personal jurisdiction over a foreign defendant, "[t]he relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there,'" *World-Wide Volkswagen*, 444 U.S. at 292 (*quoting International Shoe Co.*, 326 U.S. at 316).

While allowing for jurisdiction to be based on factors other than mere presence, this Court emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government" and that the Due Process Clause ensures not only fairness but also the "orderly administration of the laws." *International Shoe Co.*, 326 U.S. at 317, 319.

Those minimum contacts, which this Court found in *International Shoe* to be essential to create jurisdiction beyond mere physical presence in the forum state, are tied to the state's territoriality through the requirement that "there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added); *see also Asahi*, 480 U.S. at 109 (O'Connor, J., concurring); *Burger King Corp.*, 471 U.S. at 473. "[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum state." *Id.* at 474. When a connection with the forum state is merely "'random,' 'fortuitous,' or 'attenuated,'" there can be no purposeful availment, and jurisdiction cannot rest against a defendant based on the "'unilateral activity of another party or third person.'" *Id.* at 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Without purposeful availment, there cannot be a finding of personal jurisdiction. *Hanson*, 357 U.S. at 253. The Constitution protects a putative defendant against a state's exercise of judicial power where that person has no purposeful and substantial connection with that state.

C. The Obligation that a Putative Defendant Engage in "Purposeful Availment" Ensures the Fair Warning Compelled by Due Process: Territoriality Protects Fairness.

As a means of establishing notice of the prospect of suit, a defendant's purposeful connection with a forum state is an utterly appropriate surrogate for its presence

within the state's territory. Nonresident defendants are entitled to "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp.*, 471 U.S. at 472 (quoting *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring in judgment)). The fair warning "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This predictability then allows entities doing business within our country's borders, be they foreign or domestic, to have true—as opposed to imputed or constructive—awareness of the possible risks their primary conduct will entail, and to manage those risks accordingly. Where jurisdiction is based upon the defendant's own forum-directed conduct, the "fair notice" requirement is satisfied and, in the truest sense, a lawsuit in the forum cannot be unexpected. *See Id.*

Purposeful availment provides a guarantee that a putative defendant will have notice of the risk of suit in a particular forum, and fulfills the values that this Court's jurisdictional jurisprudence has identified to protect participants in our national economic life against the unconstitutional reach of a state's sovereignty.

As a consequence of the global trade that the New Jersey Supreme Court so avidly cites (yet does not grasp, *see* Section IV, *infra*), foreign entities that would seek to do business in the United States include economic actors of all sizes and juridical shapes. All are entitled to trade with the United States without being

dragged into New Jersey courts in derogation of our Constitution and New Jersey's proper role in our federal system.

The importance of fair notice to foreign putative defendants arises in part from the freedom of each state to establish through the will of its citizens bodies of law to operate within its territory. Each state's legal system is endowed with the basic power to apply the law that will govern civil disputes within its territorial boundaries, subject to the Constitution, federal law, and treaties. 28 U.S.C. §1652. The laws of the several states are largely "non-uniform." John S. Baker, Jr., *Respecting A State's Tort Law, While Confining Its Reach To That State,* 31 Seton Hall L. Rev. 698, 704 (2001). Substantive laws, policies, procedural rules, and the very makeup of the judicial organs enforcing those laws, policies, and rules can vary dramatically from state to state, particularly in the context of product liability claims, the subject matter of the instant case.

Certain states pose a greater challenge, and thus, a greater risk of loss, to product manufacturer defendants sued for product liability. For example, New Jersey's highest court holds that a product defendant may not introduce evidence of a plaintiff's comparative fault in workplace accidents, s*ee Suter v. San Angelo,* 81 N.J. 150, 406 A.2d 140 (1979), whereas in North Carolina contributory negligence is a complete bar to a third-party products liability action by an injured worker. *See* N.C. Gen. Stat §§ 99B-4(2) to (3) (1995); *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 488 S.E.2d 240 (1997). Colorado, Connecticut, and Tennessee, among others, have enacted statutes of

repose for product defect claims, Colo. Rev. Stat. Ann. § 13-80-107(1)(b)(2005); Conn. Gen. Stat. Ann. § 52-577a (2005); Tenn. Code Ann. § 29-28-103 (1993), while California, New York, and others have none. Certain other states' laws pose lesser, or more manageable, risks for product manufacturer defendants. Michigan, which does not recognize strict liability in product defect claims, has enacted caps on noneconomic damages in product liability cases, as has Ohio. *See* Mich. Comp. Laws § 600.2946a(1) (2000); Ohio Rev. Code Ann. § 2315.18 (2004).

Monetary threshold for availability of jury trials varies from state to state, each state adopts its own choice-of-law rules, and judges are elected in some states, and appointed in others. Finally, there are jurisdictions whose judicial operations themselves pose a potential risk. These risks have been subject to analysis by various organizations and the right to know and plan as captured by this Court's *in personam* jurisprudence certainly embraces these risks as well. Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 Duke L. J. 1313 (2009); American Tort Reform Association, "Judicial Hellholes, 2009," Atra.org, *www.atra.org/reports/hellholes/*; U.S. Chamber of Commerce, "Lawsuit Climate, 2010," InstituteForLegal Reform.com, *http://www.instituteforlegalreform.com/lawsuit-climate.html#/2010*.

Purposeful availment provides economic actors in American markets with the fair notice that is required to meaningfully appreciate these differences, and the risks they carry. A jurisdictional rule that places no

importance on fair warning, and thus makes no allowance for predictability, deprives a defendant of the ability to adjust its primary conduct and govern its affairs vis-à-vis the forum so as "to alleviate the risk of burdensome litigation." *See Burger King*, 471 U.S. at 476 n. 18.

D. Consistent with the Minimum Contacts Test, this Court's Stream-of-Commerce Jurisprudence Requires Purposeful Conduct Directed Toward the Forum: Territoriality Obtains.

This Court first articulated the stream-of-commerce branch of personal jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). In *World-Wide Volkswagen*, the issue presented was whether an Oklahoma court could exercise personal jurisdiction over an automobile retailer and wholesaler, both New York corporations, in a product liability action. *Id.* at 288-289. The defendants' only contact with Oklahoma was through the sale of a car to a nonresident consumer in New York, who then drove the car to Oklahoma where the subject accident occurred. *Id.* This Court found no "efforts [by defendants] to serve, directly or indirectly, the market for its product in [Oklahoma]," *id.* at 297, and held that defendants could not be subjected to personal jurisdiction where their alleged contacts with the forum state were based on the unilateral act of the consumer and not on any act of their own. *Id.* at 298.

The plaintiffs argued that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that the [subject automobile] would cause injury in Oklahoma." *Id.* at 295. This Court rejected that argument, and responded that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that *the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.*" *Id.* at 297 (emphasis added). If such a connection can be found, "a forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.

Jurisdiction could not be based solely upon the foreseeable unilateral actions of a consumer, but rather, must rest on the quality of the defendant's activities directed toward the forum state, such that a reasonable expectation of a lawsuit in that state could not come as a surprise. *Id.* The proper focus is on the defendant's behavior, not its chattel's course, or the plaintiff's hardship.

The putative defendant's conduct directed to and the resulting connection with the forum state renders assertion of jurisdiction just and fair. Fairness and federalism are comprehended in a single standard, one tied to the territorial interests of a state to enforce its laws particular to it with procedures deemed best to protect and implement those laws.

This Court again considered the stream-of-commerce branch of personal jurisdiction in *Asahi*. There the injured plaintiff alleged that a motorcycle tire, tube and sealant were defective resulting in an accident. 480 U.S. at 105-06. Plaintiff sued the Taiwanese manufacturer of the tube in California state court, which in turn filed a cross-complaint for indemnification from Asahi Metal Industry Co., the Japanese component manufacturer of the tube's valve assembly. *Id.* at 107. Asahi had no offices, property, or agents in the forum state, solicited no business and made no direct sales in the state, and did not design or control the system of distribution that brought its product into the forum state. *Id.* at 108. Asahi challenged personal jurisdiction.

This Court held that the state court could not constitutionally exercise jurisdiction over Asahi. The Court divided into two principal plurality opinions, each joined in by four Justices. Although the two pluralities agreed with the result, they differed on how to arrive at it.

Justice O'Connor, writing for a plurality, was of the view that ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112 (O'Connor, J., concurring). "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Purposefully directed conduct of the defendant could include designing a product particularly for the forum state, advertising in the forum state, establishing service channels for customers in the state,

to assume that this trend [favoring minimum contacts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251. That is as true today as it was when this Court so stated in 1958.

The most instructive of the post-*Asahi* literature on personal jurisdiction can be found, not in the law reviews, but in the case law, as state and federal courts grapple with this Court's personal jurisdiction jurisprudence. At its best, this ongoing exercise in constitutional exegesis captures the essence of what this Court has been doing and saying over the years.

A singularly persuasive and comprehensive effort is the opinion of the Fourth Circuit in *Lesnick v. Hollingsworth & Vose Co.*, 35 F. 3d 939 (4th Cir. 1994), as written by Circuit Judge Paul V. Niemeyer, joined in by Circuit Judge Francis D. Murnaghan, Jr. and District Court Judge Claude M. Hilton of the Eastern District of Virginia (sitting by designation). That court identified "the establishment of a surrogate for presence [as] the core task in defining due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders." *Id.* at 941. Through this quintessentially common law process of accretion—as opposed to the New Jersey Supreme Court's avulsion in this case—the territorial source of state power continues to order the principles of personal jurisdiction, even as those principles have evolved in their elucidation by this Court over time. *See id.* at 943.

Through its analysis of this Court's opinions over the years, the Fourth Circuit found continuity through and including *Asahi*. The coherence is given by territoriality: "The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state." *Id.* at 945.

As viewed through the reconciling lens of time, this Court has integrated the changes in our world into the jurisdictional principles found in our Constitution. The accommodative power of this Court's jurisdictional doctrine was aptly described by the Seventh Circuit in *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004): "[A]lthough technological advances may alter the analysis of personal jurisdiction, those advances may not eviscerate the constitutional limits on a state's power to exercise jurisdiction over nonresident defendants." 383 F.3d at 550 (*citing Hanson*, 357 U.S. at 250-51).

III. THE NEW JERSEY SUPREME COURT'S DECISION IS FUNDAMENTALLY AT ODDS WITH THE PROTECTIONS GRANTED PUTATIVE DEFENDANTS BY THE CONSTITUTION.

The holding of the New Jersey Supreme Court is as simple as it is stark: a foreign manufacturer that markets to the United States may be haled into a New Jersey court on a product liability claim as long as the product was purchased by a New Jersey consumer. A plaintiff no longer has to demonstrate that the defendant thought about New Jersey or even knew that it exists.

The limitless assertion of worldwide jurisdiction by the court, without even a by-your-leave to this Court's jurisprudence, violates the Constitution and is unsupported by the smorgasbord of quasi-legislative "policies" the court announced. Further, the leitmotif of the opinion—that the New Jersey Supreme Court is compelled to adopt a radical transformation of the law by the "modern truths" of a rapidly changing world economy—is nothing more than an excuse for judicial exceptionalism. The court does not respect globalization but is fighting against it: erecting a trade barrier against the very globalization it claims justifies its acting to discard what it described as this Court's "outmoded constructs of jurisdiction."

A. The New Jersey Supreme Court's Ruling Violates the Constitution as Interpreted by this Court.

Both of the competing pluralities in *Asahi* required that, before state long-arm jurisdiction could attach pursuant to the stream-of-commerce branch of *in personam* jurisdiction, the forum state be in the sights of the putative defendant, either by an act purposely directed to the state (for Justice O'Connor, *Asahi*, 480 U.S. at 112), or by awareness that the final product is being sold in the forum state (for Justice Brennan, *id.* at 117). The New Jersey Supreme Court found that only the United States was in Petitioner's sights, which was enough for that court, but not for the Constitution. Pet. App. 31a. No jurisdictional evidence was presented that J. McIntyre had ever taken the slightest purposeful act toward New Jersey or even considered New Jersey as a possible sales locale for any machine, much less the

one that wound up as the subject matter of the instant action: "J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States." Pet. App. 39a-40a.

B. The New Jersey Supreme Court's Ruling Destroys the Notion of Individual Sovereignties Inherent in Our System of Federalism.

New Jersey's elimination of the constitutional right of due process in personal jurisdiction was anticipated and named for what it is over 16 years ago by the Fourth Circuit: an assault on the Constitution and the liberty to be free from the baseless exercise of jurisdiction by a state. *Lesnick*, 35 F.3d at 945. The Fourth Circuit analyzed a proposed rule that was identical to that adopted by the New Jersey Supreme Court in this case: "To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Id.* Identifying the essential flaws of the rule now adopted by the New Jersey Supreme Court, the Fourth Circuit held that such a rule, by eliminating the need for deliberate conduct by defendants, would "mak[e] it impossible for defendants to plan and structure their business contacts and risks." *Id.* The Fourth Circuit understood the fundamental unfairness that arises from a rule failing to ground jurisdiction, under any branch of the doctrine, in a putative defendant's purposeful creation of a substantial connection to the forum state. Requiring a substantial

connection to the forum "'protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he established no meaningful 'contacts, ties or relations.'" *Burger King Corp.*, 471 U.S. at 471-72 (quoting *International Shoe*, 326 U.S. at 319).

C. The Rationales Advanced by the New Jersey Supreme Court Are as Irrelevant as They Are Unavailing.

The New Jersey Supreme Court sprinkled a host of collateral factors throughout its opinion seeking to justify its determination to discard this Court's jurisprudence: New Jersey's interest in protecting its citizens from allegedly defective products; the illogic of allowing a forum to be defeated by hypothetical outsourcing to other countries; the new world of commerce; the unreasonableness of depriving plaintiff of a New Jersey forum when the alternative is the courts of the United Kingdom; and the ease in an age of modern travel for the defendant to find its way to New Jersey because it had found its way to other places in the United States.

First, each is irrelevant. The relevant constitutional inquiry is not whether the Mr. Nicastro was hurt or whether the practical burden on J. McIntyre in litigating the claim in New Jersey is relatively slight. The sole concern is whether J. McIntyre had minimum contacts with New Jersey. Absent the required minimum contacts, there can be no finding of personal jurisdiction. "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a *prerequisite* to its exercise of power over him."

Hanson, 357 U.S. at 251 (emphasis supplied). Whatever the source of felt need, however deep the sense of injustice at a tragic situation, a state sovereign whose boundaries have not been transgressed by a purposeful act that thereby created a substantial connection between the alleged wrongdoer and that state, is forbidden by the Constitution from exercising any adjudicative authority over that person.

Second, without identifying any supporting legal authority, the New Jersey Supreme Court stated: "It would be unreasonable to expect that plaintiff's only form of relief is to be found in the courts of the United Kingdom," giving as its only reason the possibility that the United Kingdom "may not have the same protections provided by this State's product-liability law." Pet. App. 41a-42a. This is a non sequitur. That the law of the United Kingdom is different than that of New Jersey has no logical relation to minimum contacts.

Third, despite the stated importance to the New Jersey Supreme Court's holding, the judicially-noticed theme of the "global marketplace" was not explored or explained, much less given the heft of any evidentiary support. This theme requires a belief that the current status of international trade is such that large industrial machinery now flows more quickly and readily through new, previously un-realized channels. In the real world products small and large, including heavy machinery such as the shear machine at issue (manufactured and sold 15 years ago), travel across borders as they always have: they are shipped. While the United States is certainly part of an international economy, the basic methods of selling and transporting goods are the same as they were in the time of *Asahi*. The belief that a

"radical transformation of the international economy," Pet. App. at 35a, somehow effects a profound change in the nature of product transportation and distribution is wrong and offers no basis to reject this Court's *in personam* jurisdiction jurisprudence.

The modern economy has always been marked by the existence of global trade, and foreign manufacturers have been doing business in the United States since the 19th century. Commentators, including those cited by the New Jersey Supreme Court and Respondents in the proceedings below, describe the movement as occurring over the last 200 years, not the last 20. *See* Friedman, *The World Is Flat*, 9-10, Farrar, Straus and Giroux, 2006; Licht, *Industrializing America: The Nineteenth Century* 133 (1995). The extent of what is considered "global" trade can and should be compared to the levels of locally-based economic activity which, other commentators have determined, far exceeds the level of what happens in a so-called "flattened" world. *See* Ghemawat, *Why the World Isn't Flat*, Foreign Policy, February 14, 2007 (determining that over 90 % of all phone calls, internet web traffic, and investment is local). It is a flawed notion to rest the elimination of an entire jurisprudence upon such an undefined premise as the advent of "global trade."

Society's collective ability to communicate and transfer information through electronic means may have accelerated in recent years, and tangible consumer goods can often be ordered more rapidly, but the conduits through which goods travel are essentially no different than they were 50 years ago. This is best illustrated by the case at hand. The three-ton shear

machine at issue was ordered and transported overland from MMA's Ohio location to Curcio Scrap Metal in New Jersey. Today, as in yesteryear, products are delivered to their final destinations by air, sea, rail, or road.

To pretend that this case exemplifies some unprecedented tide of foreign products infiltrating New Jersey without quarter, such that its courts must abandon purposeful availment and constitutional due process, ignores that New Jersey has always been a portal state. International trade, such as it is, has long figured prominently in state and national economies.

The development of the global marketplace dictates an ever more vigorous enforcement of this Court's minimum contacts/purposeful availment jurisprudence. In this modern era of free trade, our country's multi- and bi-lateral agreements among nations rest with the constitutional competence of the federal sovereign. New Jersey courts have no business taking steps to mitigate any perceived unfairness of free trade or the freer flow of goods across national borders. The irony of the New Jersey Supreme Court's decision is that the very changes in the world economy it cited argue against the result reached. If New Jersey's citizens have been placed at risk by the flow of dangerous products from abroad, then all Americans have, and the remedy rests with the United States and its regulation of international trade.

D. A "Purposeful *Non*-Availment" Test Finds No Home in Logic or this Court's Jurisprudence.

The New Jersey Supreme Court states: "A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products into this State." Pet. App. 36a. That statement makes no sense in the context of the new rule the court adopted, which permits the exercise of jurisdiction over a foreign manufacturer that has never marketed into New Jersey. Perhaps this statement means that a foreign manufacturer must ensure that none of its products are ever sold to a New Jersey consumer by anyone. But in order to keep out of New Jersey, a foreign producer would have to become entangled with it. Although the court does not describe what "makes clear" may mean, this language suggests the obligation to take affirmative steps to keep products out of New Jersey, which may mean that foreign companies will have to audit the books of its distributors, issue proclamations not to sell its products into New Jersey, and be subject to the hindsight scrutiny of the New Jersey courts in litigating, as a preliminary jurisdictional issue, whether it exercised adequate diligence in keeping away from the state.

This "purposeful non-availment" test, for want of a better term, turns this Court's jurisprudence on its head. This Court requires that a putative defendant create a substantial connection to the forum state before jurisdiction can attach. The very term "purposeful" requires conduct. Even the language from *World-Wide Volkswagen* the New Jersey Supreme Court block quotes in its decision, states that a putative defendant

can avoid the risk of burdensome litigation by "severing its connection with the State." Pet. App. 19a. All that matters is "its" connection with the state, not another's.

Such an obligation to draw up and enforce a "blacklist" of states cannot be a reasonable construction of *World-Wide Volkswagen* or a helpful exercise in any respect. It would also run afoul of this Court's admonishment in *Hertz Corp. v. Friend*, 509 U.S.__, 130 S. Ct. 1181, 1193 (2010), against the use of "complex jurisdictional tests" that "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims . . .."

New Jersey has redefined due process to mean that a defendant must modify someone else's behavior, not, as this Court requires, the defendant's own behavior. *See World-Wide Volkswagen*, 444 U.S. 297. Such a redefinition creates unnecessary difficulties in application, even as it violates this Court's jurisprudence.

IV. THE NEW JERSEY SUPREME COURT DOES NOT UNDERSTAND THE VERY MODERN ECONOMY TO WHICH IT PURPORTS TO RESPOND.

In the course of discarding an entire jurisprudence, the New Jersey Supreme Court claimed to fashion a rule of personal jurisdiction that "reflect[s] modern truths" and takes into account the new realities of international trade. Pet. App. 35a. The court has done nothing of the sort; it has articulated little more than a parochial,

outdated protectionism that seeks to solve what it sees as problems of modern trade by erecting what amounts to a new international trade barrier. This is not New Jersey's business; it is the Nation's business, and the proper loci for addressing issues related to the globalization of trade are Congress and the Executive.

The impact on trade of the New Jersey Supreme Court's decision is potentially catastrophic. Now any person in the world making products that are purchased by a New Jersey consumer may be forced to defend a lawsuit in New Jersey, a place the person may never have heard of. Nor will this stop at New Jersey. As Petitioners in the tandem case of *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76, state in their Petition For a Writ of Certiorari at 17: "well over half the states have long-arm statutes authorizing the exercise of jurisdiction to the full extent permitted by due process." If the New Jersey Supreme Court's ruling is correct, without the need of any change in governing statutes producers large and small from around the world will be haled into state courts without having done anything to associate themselves with any of those states. Nor is it likely that those states without the longest of long arm statutes will refrain from reaping this bonanza for their residents and lawyers.

The New Jersey Supreme Court's determination to broadly and unilaterally increase the scope of its jurisdictional exercise over foreign manufacturers appears to be animated by several concerns, including a belief that hypothetical offshore outsourcings might create a "strange indeed" situation, one to which the court gives no factual content. Pet. App. 35a. Of

seemingly greater concern to the court in formulating its new rule—to every injury there is a state to sue in—is the fear that a foreign producer of goods could be immune from suit in every state, even though the producer would be amenable to suit in another country. Pet. 32a, 41a-42a. The New Jersey Supreme Court found jurisdiction unavailing in a nation—the United Kingdom—whose courts are trusted, fair, competent, and as free from the stain of corruption or undue influence as any judicial system in the world, including that of the United States.

Such parochialism threatens our relationship with other countries and their judicial systems. "The reluctance of other nations to recognize U.S. judgments is inextricably tied to how U.S. courts exercise personal jurisdiction." Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 51 (2006). Multiplying the problem that New Jersey presents by this case to include all the states that adopt a constitutionally-maximum approach to long-arm jurisdiction could create a nightmare, for this country and for all our courts that depend upon the comity of the courts of other nations to respect and enforce our judgments.

Whether it is preferable to have a state court forum for a claim against every foreign producer of every good that allegedly causes injury, is not for a state to determine. It may or may not even be a problem. *See, e.g.*, *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, 924 S.W.2d 907, 912 (Tenn. Ct. App. 1996). The authority to deal with these issues rests with

the United States, not New Jersey. A bill is now pending in Congress that seeks to address this issue by requiring certain foreign manufacturers, as a condition to selling products in the United States, to pick a state in which it will be subject to consensual jurisdiction. *See* H.R. 4678, 111th Cong. (2010). That legislation, if enacted, will require foreign manufacturers to register with the appropriate regulatory agency and to establish a registered agent authorized to accept service of process on their behalf for the purpose of all civil and regulatory actions in state and federal courts in a state with a substantial connection to the importation, distribution, or sale of the products.

In sum, the New Jersey Supreme Court has failed to heed this Court's admonition in *Asahi*, 480 U.S. at 115, when it quoted *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting): "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

The New Jersey Supreme Court's new rule also threatens trade within our borders. Please consider the following hypothetical: A candle maker in Alaska starts a small candle business in Anchorage. His candles are large and can be used in most homes anywhere. He has no developed marketing or sales plan as of yet, but is interested in selling as many candles as he can. His friend in Seattle, Washington has a gift store and they have agreed to an arrangement in which the friend will sell the candle maker's products in Seattle. A New Jersey man vacations in Seattle, visits the shop and orders one of the larger candles, which the shopkeeper

agrees to ship to his home in New Jersey. The Alaskan candle maker is never informed of this sale. The day the candle arrives, the New Jersey man opens the package and lights the candle. A short time later, the candle improperly melts and a fire starts, consuming the house and injuring the man's family. The New Jersey man sues the candle maker for damages in his state court alleging product defect. Though the candle maker had no connection to New Jersey and he exhibited no intention, actions, or awareness that his product should or would be sold and shipped to someone there, under the New Jersey Supreme Court's holding the candle maker is nevertheless amenable to jurisdiction and is now forced to defend the lawsuit in New Jersey. That result violates the Alaskan candle maker's due process rights guaranteed by the Constitution no less than it does those of Petitioner and for the same reasons, and wrongly interferes with the operation of the common market that operates within our Union.

V. THE ELUCIDATION BY JUSTICE O'CONNOR IN *ASAHI* BEST COMPORTS WITH THIS COURT'S JURISDICTIONAL JURISPRUDENCE AND PROTECTS AGAINST OVER-REACHING BY LOWER COURTS.

For the past nearly-quarter century, the law of *in personam* long-arm jurisdiction pursuant to its stream-of-commerce branch has remained open to mis-interpretation even as the underlying doctrine of adjudicative jurisdiction has not changed. The lower courts have been provided with two competing plurality opinions in *Asahi*, which take very different views of the constitutional limitations on a state's exercise of jurisdiction over foreign putative defendants.

The analysis of Justice O'Connor's concurring opinion better comports with this Court's jurisprudence in at least two respects. First, it embodies the requirement of active engagement, of personal agency, that this Court has made the centerpiece of its formulations of personal jurisdiction limits under the Constitution. Second, it avoids the subjectivity that inheres in the test of mere awareness advanced by Justice Brennan. The concreteness of Justice O'Connor's formulation is especially valuable in giving out-of-state actors the fair notice that this Court has deemed essential in allowing persons to conform their behavior to avoid, if they choose, the possibility of being haled into the courts of a state. By locating a foreign putative defendant's right not to be improperly dragged into a state in the Due Process Clause of the Fourteenth Amendment, this Court places it among the core negative liberties that operate against state power. As this case demonstrates, a state can act to aggrandize its power at the expense of the Constitution. A clear, objective test is the best protection for our liberty.

There are strong prudential reasons for confirming the jurisprudence of territorial jurisdiction set forth by Justice O'Connor in her concurring opinion. First, while no other court has gone as far as the court below and discarded the entirety of this Court's jurisprudence in this area, other courts have come perilously close, interpreting the language of Justice Brennan's concurring opinion of actual awareness as allowing jurisdiction to attach upon a finding of only constructive awareness. This experience suggests that Justice Brennan's departure from this Court's jurisprudence is particularly subject to abuse by the lower courts.

Second, rejecting a rule that finds mere awareness, actual or constructive, sufficient for jurisdiction may give assurance to other countries and their courts that the state courts will be more restrained than has heretofore been sometimes the case, and re-affirm this Court's commitment to the "[g]reat care and reserve" embraced in *Asahi*. *See* Parrish, *supra*, at 45-53. Third, and in aid of several of the above reasons, Justice O'Connor's analysis avoids the problem of leaving the determination of our liberty with a subjective judge-by-judge assessment of what is fair and just. *See Burnham*, 495 U.S. at 622-623 (Scalia, J., concurring).

A. Engagement By Action, Not Simply Awareness of Another's Acts

At the outset of her plurality opinion in *Asahi*, Justice O'Connor sets forth the formulations that this Court has used in describing what a nonresident must do before that person can lawfully be haled into a state court: "defendant purposefully established minimum contacts in the forum state;" "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State;" "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Asahi*, 480 U.S. at 108-09 (O'Connor, J., concurring). Common to these formulations is that a defendant must intentionally act and direct that action at, and sufficiently in, the very state that seeks to exercise power over that person.

This Court's unvarying adoption of language of purposeful action by the nonresident defendant as a requisite for long-arm jurisdiction, led Justice O'Connor to state that "[t]he 'substantial connection'" of *Burger King*, 471 U.S. at 475, between the defendant and the forum state necessary for a finding of minimum contacts "must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi*, 480 U.S. at 112 (O'Connor, J. concurring). Justice O'Connor supplied the emphasis.

As a corollary to her analysis, Justice O'Connor rejected as inconsistent with this Court's jurisprudence that mere awareness by a defendant that "the stream of commerce may or will sweep the product into the forum State" permits the state to exercise judicial power over the defendant. *Id.*

In his opinion, Justice Brennan employed far more sparingly the language of purposeful availment and purposeful engagement in forum activities. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). He found mere awareness sufficient to cause jurisdiction to attach (although it was a specific awareness that the product was being sold into the forum state, an element of proof not present in the instant case). *Id.* at 121.

Justice Brennan's sparse use of this Court's precedents defining jurisdictional limits is an indication that his own suggested rule was a departure. Indeed, an analysis of his opinion demonstrates that it constituted a complete break with this Court's jurisprudence. While this Court required that the

putative defendant itself intentionally act at, in, or toward the forum state, Justice Brennan would have it sufficient that another act and the putative defendant be simply aware of the action. That separation of actor and defendant was nowhere sanctioned by any prior opinion of this Court. It appears but once, and that is in Justice Brennan's concurrence.

Justice Brennan's concurrence does not respect the plain meaning of the terms employed by this Court. Purposeful availment does not mean passive awareness. As the Michigan Court of Appeals aptly described in *Vargas v. Hoing Jin Crown Corp.*, 247 Mich.App. 278, 284-85, 636 N.W.2d 291, 296 (Mich. Ct. App. 2001), "purposeful availment" means "something akin either to a deliberate undertaking to do or cause an act or thing to be done in" the forum state "or conduct which can be properly regarded as a prime generating cause of the effects resulting in" the forum state. It must be something more than a *passive* availment of forum state opportunities. The Michigan courts have thoughtfully applied this Court's jurisprudence in the realm of personal jurisdiction, giving to this Court's language a plain, logical, and persuasive reading. "[B]enefit[ing] economically from the sale" in the forum state, sufficient (with knowledge thereof) for Justice Brennan, *Asahi*, 480 U.S. at 121 (Brennan, J., concurring in part and concurring in the judgment), fits squarely within what the Michigan courts identify as passive availment of state opportunities, and squarely outside the constitutional limits of state exercise of jurisdiction over nonresident putative defendants.

B. Conforming, Not Guessing

As discussed in Section II.C., *supra*, the essential due process considerations of this Court's jurisprudence are expressed through the right of a person to have adequate notice of those acts which will cause the person to be subject to a state's jurisdiction. Through purposeful availment a producer will have a fair opportunity to conform its conduct so as to avoid state power if the producer chooses. To predicate jurisdiction on anything less leads to a rule where "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296. A rule that allows for jurisdiction to be predicated upon the behavior of another party is not consonant with the predictability that is key to meaningful due process. To subject defendants to judgment in locations based on the activity of third persons and not their own deliberate conduct, renders it "impossible for defendants to plan and structure their business contacts and risks." *Lesnick*, 35 F.3d at 945.

The formulation of the jurisprudence by Justice O'Connor is consistent with the fair notice component of the rule and Justice Brennan's is not. Justice O'Connor's concurrence includes the protection whereby a producer is informed that if the producer does something directed at a state, the producer may wind up in its court. Justice Brennan informs a producer that a mere state of mind, however later determined by a court, may (or may not, if unreasonable or unfair) result in jurisdiction. Justice Brennan posits a test that is fundamentally unfair because of its imprecision and the degree of discretion allowed thereby to courts.

Justice Brennan's test is inconsistent with reasonable certainty, and violates the fair notice foundations of due process required by this Court in a state's exercise of long-arm jurisdiction under the Constitution.

C. An Invitation to Excess

Justice Brennan's test invites abuse by lower courts. While Justice Brennan's opinion requires a defendant's actual awareness of sales into the forum state, *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment), courts have, in several cases, found it tempting to move from actual to constructive knowledge, from knowing to "should have known," a temptation they were unable to resist.

In *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613 n. 4 (8th Cir. 1994), the Eighth Circuit extended the Justice Brennan test to make the unwarranted leap from finding that a foreign fireworks manufacturer supplied fireworks to a regional distributor, which in turn sold substantial quantities of the products into South Dakota, to a finding that the manufacturer should have "known" that its products could make their way into South Dakota, despite the absence of purposeful connection by the manufacturer with South Dakota.

In *A. Uberti C. v. Leonardo*, 181 Ariz. 565, 574, 892 P.2d 1354, 1363 (1995), the Arizona Supreme Court, claiming to rely on Justice Brennan's approach, found jurisdiction over a foreign gun manufacturer having no actual knowledge that its products, sold in high volume

through a single distributor throughout the United States, had come into Arizona. Citing *Barone*, the court imputed to the defendant a constructive knowledge of the efforts of its distributors.

In *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 660, 425 S.E.2d 609, 615 (1992), also claiming to rely on Justice Brennan's approach in *Asahi*, the Supreme Court of Appeals of West Virginia found that because the defendant had "benefited from" the high sales of its products that made their way into the state via the efforts of a wholly-owned distributor, the court presumed control of those efforts, and constructed awareness of them.

Taking the opportunity afforded by Justice Brennan's test to impermissibly expand the exercise of jurisdiction, these courts failed to observe the constitutional limits imposed by this Court on long-arm jurisdiction. Perhaps these courts were animated by the potentially hazardous nature of the products that were the subject matters of the litigations. That is not, however, a relevant factor for the exercise of jurisdiction. The apparent susceptibility of Justice Brennan's test to be misused to eliminate completely any thought of a state from the requirements for exercise of long-arm jurisdiction by that state, suggests that Justice Brennan's test does not easily lend itself to successful application in the everyday world of lower court decision-making.

D. "Great Care and Reserve" in Exercise of Jurisdiction Over Persons in Other Countries

Following the principles laid down by Justice O'Connor's concurring plurality opinion will result in the proper application of the Constitution to determine whether foreign putative defendants can be haled into state courts in this country. No longer will merely thinking about a state or being presumed to think about a state be sufficient to be dragged into that state's courts from, literally, half a world away.

By responding to the audacious action of the New Jersey Supreme Court in discarding all that this Court has established over the decades, and re-affirming the principles established thereby by adopting Justice O'Connor's re-statement of those principles, this Court will also re-affirm the paramount value of "great care and reserve" in the exercise of personal jurisdiction in the international sphere.

E. Siting Fair Play and Substantial Justice in a Rule of Law, Not in the Subjective Appreciation of Members of the Judiciary

The very first sentence of Justice O'Connor's concurring opinion in *Asahi* defines the stakes of that case, this case, and all others where long-arm jurisdiction is being claimed: "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant." 480 U.S. at 108. While the caption may read plaintiff against putative defendant, the Constitution sees the state against a person, and

necessarily seeks to protect the latter's liberty interest. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n. 10 (1982).

The right to be free from the unlawful exercise of state power is too important to be left to each American jurist's "subjective assessment of what is fair and just." *Burnham*, 495 U.S. at 623 (Scalia, J., concurring). Justice O'Connor's concurring opinion gives further definition "to jurisdictional rules that are generally applied and have always been applied in the United States." *Id.* State courts can adhere to those rules and find a result that adheres to the notions of due process that have guided this Court in its formulation of jurisdictional jurisprudence. Those courts need search no farther for guidance.

Justice Brennan, on the other hand, concluded that minimum contacts existed with California, but then joined Part II-B of the opinion of this Court delivered by Justice O'Connor, which concluded that personal jurisdiction over Asahi "would be unreasonable and unfair." *Asahi*, 480 U.S. at 116. This was dictum for the Justices who joined in Justice O'Connor's concurrence and who joined in Part II-B of *Asahi*, because those Justices had concluded there were no minimum contacts.

It is, rather, unreasonable and unfair for judges to be allowed a savings power over a determination of jurisdiction. No "equitable bargain," *Burnham*, 495 U.S. at 624 (Scalia, J., concurring), need be struck to grant or deny jurisdiction as long as the rule itself is properly fashioned by this Court to protect the right of persons not to be dragged into state courts in violation of the

Due Process Clause of the Fourteenth Amendment. The application of the principles set down by Justice O'Connor achieves justice and removes subjectivity.

CONCLUSION

This Court has not abandoned the principles embodied in its personal jurisdiction jurisprudence in the face of economic developments. Technologies may come and go, but the liberty we are guaranteed under the Due Process Clause is not extinguished in the name of progress. Nor are state lines; and just as each state is allowed to establish its laws and procedures within its borders, it is not free to seek out new territories to apply them, either in or out of this country.

Our rights are secured by the application of settled principles of territorial jurisdiction. The choice between fairness and federalism is a false dichotomy: territoriality achieves both, protecting the liberty of the Due Process Clause, while insuring that the legitimate interests of the states of our country are given due sway. And not least, the application of the *in personam* jurisdiction jurisprudence as established by this Court will serve to insulate the operation of our foreign affairs by the federal sovereign from the actions of state courts.

For the foregoing reasons, Petitioner J. McIntyre Machinery, Ltd. respectfully requests that this Court reverse the decision of the Supreme Court of New Jersey.

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IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

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QUESTION PRESENTED

Does the Due Process Clause limit the power of a forum state to exercise specific jurisdiction over a manufacturer that creates, controls, or employs a distribution scheme to deliver its products into a national market with the foreseeable consequence that they would be purchased by consumers in any state, including the forum state?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondent Robert Nicastro is a New Jersey resident who was employed by Curcio Scrap Metal, Inc., in Saddle Brook, New Jersey for approximately thirty years until October 2001, when four of his fingers were severed from his right hand by a three-ton metal-shearing machine manufactured in England by the Petitioner, J. McIntyre Machinery Ltd. (hereinafter "McIntyre England"). (J.A. 6a-8a, 58a.) The 25-inch blade of the machine amputated Mr. Nicastro's fingers because it lacked adequate safety protections and was defectively designed. (J.A. 58a-59a, 75a-76a.) But the facts of this case began six or seven years before Mr. Nicastro's accident, when McIntyre England exhibited at the Institute of Scrap Recycling Industries ("ISRI") convention in Las Vegas, Nevada. (J.A. 78a, 114a-115a.)

McIntyre England is a manufacturer of heavy equipment used in the scrap metal industry.[1] It is a United Kingdom corporation with its principal place of business in Nottingham, England. (J.A. 83a, 35a.) Despite its disdain for American law (J.A. 130a) ("American law—who needs it?!"), all McIntyre England wished to do was "sell our products in the States—and get paid!" (J.A. 134a.) Consistent with that desire, McIntyre England regularly marketed the company's heavy equipment for use in the scrap metal industry at trade shows, conventions and

[1] McIntyre England filed for liquidation in Britain in or about April 2009. The Respondents timely filed a Proof of Debt with the Joint Liquidator on March 22, 2010. (*See* Resp'ts' Br. in Opp'n App. 1a.)

conferences throughout the United States from 1990 until 2005. (J.A. 114a-117a.) The president of McIntyre England frequently traveled from the United Kingdom to attend and exhibit at these trade shows, which took place across America in major convention locations on the East, West, and Gulf coasts and in inland locations like Las Vegas and San Antonio. (*Id.*) In total, McIntyre England employees attended twenty-six events in various states during a fifteen-year period. (*Id.*)

At these trade shows, McIntyre England employees had direct contact with potential and actual U.S. customers from around the nation, and would have learned where their machines were going when they were sent to the United States. (J.A. 174a.) ISRI conventions attracted "lots of attendees, at least 3,000, probably more" (J.A. 48a), who were "interested in seeing—and purchasing—new equipment" used in the scrap processing business. (J.A. 49a.) McIntyre England would sell shears "straight off the stand at an American Exhibition" and believed these sales were an indicator of good economic times. (Appellants' N.J. Superior Ct. App. 205.)

At one such trade show in Las Vegas in 1994 or 1995, Mr. Nicastro's employer, Frank Curcio, first learned of the J. McIntyre 640 metal shearing machine (J.A. 77a-78a), a machine that is about eight feet long and six feet high, weighs more than three tons, and uses a 25-inch blade to cut with the maximum force of 180 tons. (Appellants' N.J. Superior Ct. App. 200.) McIntyre England attended that very trade show. (J.A. 115a.) The J. McIntyre 640 shear was distributed throughout the United States by McIntyre England's exclusive distributor

at the time, McIntyre Machinery America, Ltd., (hereinafter "McIntyre America"), of Stow, Ohio. (Pet. App. 76a; J.A. 43a, 52a-53a.)

McIntyre England "appointed" its exclusive distributors (J.A. 52a), who are the only companies "authorized" to sell McIntyre Machinery in the United States. (J.A. 52a-53a.) Any McIntyre England machine purchased through anyone other than an "exclusive distributor" "may not have been authorized for sale by the manufacturer, and as such may be being sold illegally and without the latest operating instructions, warning labels and operator guarding." (*Id.*) McIntyre England built machines for sale by McIntyre America only after McIntyre America received firm orders for those products. (J.A. 135a.) McIntyre England provided literature about its shears to McIntyre America (J.A. 121a), and McIntyre America provided that literature to the U.S. customers of McIntyre England's equipment, including Mr. Nicastro's employer. (J.A. 78a-79a.) This literature provided McIntyre England's address and contact information in England. (J.A. 78a.)

Although McIntyre America was a separate corporate entity from McIntyre England, it used the "McIntyre" name, and it acted as the conduit for McIntyre England machines for the entire nation, "America's link" to McIntyre England. (J.A. 78a.) McIntyre England called McIntyre America its "agent" for U.S. sales. (J.A. 52a-53a.) McIntyre America sold machines and "handled machinery repairs and warranty issues" for McIntyre England. (J.A. 126a.) McIntyre England worked closely with McIntyre America to make sure that McIntyre America was able to sell McIntyre England's products throughout the United States. (J.A. 134a-

139a.) McIntyre England offered to conduct business meetings with McIntyre America in the United States to help make this happen. (J.A. 135a-139a.) McIntyre America structured its advertising and sales efforts in accordance with the "direction and guidance" of McIntyre England's president. (J.A. 123a-124a.) McIntyre America placed full-page ads for the full line of McIntyre England's products in trade publications in the United States. (J.A. 128a.) McIntyre America also shared booths with McIntyre England at national trade shows. (*Id.*)

McIntyre England's relationship to finished products sold in the United States continued even after it put those products into a container to ship to McIntyre America. McIntyre England reminded its American distributor that machines in the distributor's possession "are our property until they have been paid for in full." (J.A. 134a.) It remained involved with McIntyre America's stock and sales of McIntyre England's products even after McIntyre America took possession (J.A. 135a-139a), suggesting at one point that McIntyre America liquidate its stock (J.A. 135a-136a) and offering to send McIntyre England employees to "clarify" the "spares/stock situation." (J.A. 138a.) If McIntyre America were unable to sell the machines, McIntyre England would "collect" them from McIntyre America and "bring . . . th[em] back." (J.A. 135a.) McIntyre America sold McIntyre England's products on a commission basis, which was the subject of some tension. (J.A. 131a-132a.) McIntyre America was permitted to bill McIntyre England for its commission only after McIntyre England received payment in full from the American customer. (J.A. 131a.) McIntyre England maintained a £5 million insurance policy to pay for any liabilities it incurred

due to its defective products, including the shearing machine that amputated Mr. Nicastro's fingers. (*See* Interrog. Resp. 8.) In other lawsuits involving its products, McIntyre England assured McIntyre America that any losses caused by a defect in McIntyre England's product would be covered by McIntyre England's insurance policy, not by McIntyre America. (J.A. 129a-130a.) It wasn't until six years into their business relationship, in 2000, that McIntyre America even acquired separate liability insurance. (J.A. 126a.) After "the demise of [McIntyre England's] former agent McIntyre America in 2001," Strip Technology Inc. in Fort Worth, Texas was "appointed sole agents" for the sale of McIntyre England's shears. (J.A. 52a-53a.)

As a direct result of McIntyre England's marketing of its machinery for sale throughout the United States, Mr. Nicastro's employer in 1995 purchased, through McIntyre America, the J. McIntyre 640 metal shearing machine that injured Mr. Nicastro. (J.A. 43a.) His employer paid approximately $25,000 for the machine. (*Id.*) McIntyre America knew that the machine in question was headed to New Jersey. (J.A. 78a-79a.) Affixed to the machine was a metal plate bearing the model and serial numbers for the machine, as well as McIntyre England's address and telephone number. (Appellants' N.J. Superior Ct. App. 138.) The machine had not been not altered in any material way since it had been manufactured by McIntyre England in 1995. (J.A. 6a-8a.) It was accompanied by documentation about, and an instruction manual for, the machine, both of which had McIntyre England's address in England, and its telephone and fax numbers. (J.A. 78a, 44a-45a.) Mr. Nicastro's employer attested that if the company had needed

any repair parts, he would have called McIntyre England. (J.A. 78a.)

The J. McIntyre 640 shear is used "throughout the world" (J.A. 44a) and is "well established in America." (Appellants' N.J. Superior Ct. App. 205.) McIntyre England represented in the literature that accompanied the 640 shear that the machine conformed to American safety standards (J.A. 61a), and McIntyre England advised United States buyers to familiarize themselves with safety standards governing its use in the United States. (J.A. 46a, 78a-79a.)

In the late 1990s, around the time when the machine that injured Mr. Nicastro was sold in the United States, the United States was a robust market for McIntyre England shears while markets in the rest of the world were "lousy." (J.A. 136a.) At least two container[2] loads of McIntyre England's shears were imported into the United States in just one six month period in 2003. (J.A. 52a-53a.) At least four model 640 machines were sold into New Jersey. (J.A. 141a.) Consumers in the United States were advised to contact McIntyre England directly for the supply of replacement parts. (J.A. 78a.)[3]

[2] A standard 40 foot container holds volume of about 2400 cubic feet and weight of about 36 tons. German Balikbayan Quality Service, Container Measurement, *available at* http://www.gbqs-muc.com/contmeas.html (last visited Nov. 15, 2010).

[3] The 640 is only one of many machines manufactured by McIntyre England and marketed by McIntyre England in the United States. The complete line includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment, and TARDIS, the world's best aluminum dross

Although McIntyre England held out that the 640 shear conformed to American safety standards (J.A. 61a), the J. McIntyre 640 shear involved in this case "did not meet American National Standard Institute requirements . . . or the Regulations from the Occupational Safety and Health Administration," nor did it conform to "the recognized guidelines published by the National Safety Council and the American Society of Mechanical Engineers for protecting machine operators." (J.A. 76a.) On October 11, 2001, Mr. Nicastro's right hand got caught in the J. McIntyre 640 shear (J.A. 7a.), amputating Mr. Nicastro's fingers. (J.A. 76a.)[4]

pressing and cooling system." (J.A. 31a.) TARDIS was introduced "to the U.S.A." in Florida in 1996, in Las Vegas in 1997, and in San Francisco in 1998. (J.A. 125a.) It is protected by at least seven European and American patents (J.A. 36a), at least four of which are American.

[3] At least 80 TARDIS units had been sold into the United States as of early 1999. (J.A. 136a.) McIntyre England had a "Commissioning Engineer" in the United States to install TARDIS systems here, including in states of Virginia, Illinois, Washington, Iowa, and Kentucky. (J.A. 119a.)

[4] Curcio Scrap Metal's New Jersey-based workers compensation insurance has paid benefits to Mr. Nicastro for some of his lost wages and medical expenses. In New Jersey, workers compensation provides compensatory benefits to injured employees on a no-fault basis in lieu of the employer's liability to its employee. *See generally* N.J. Stat. Ann. § 34:15-7 (West 2010); *Naseef v. Cord, Inc.*, 225 A.2d 343 (N.J. 1966). As of March 10, 2010, the insurer had paid $443,698.72, of which $238,373.72 was for medical expenses and $185,325 was for lost wages for the eight-and-a-half years between Mr. Nicastro's injury and March 10, 2010. This equals approximately $20,000 per year in lost wages. Under New Jersey law, in the event that Mr. Nicastro recovers any damages from McIntyre England, either by settlement or by judgment, he will be required to repay the insurance carrier 66 percent of all the benefits he

Mr. Nicastro sued McIntyre England for product liability under New Jersey law in New Jersey state court. (J.A. 5a-11a.) His wife Roseann Nicastro[5] asserted claims for loss of consortium. (J.A. 9a.) Although McIntyre America was named as a defendant in the complaint, McIntyre America went bankrupt and dissolved in 2001 (J.A. 91a-93a), just after Mr. Nicastro's accident and two years before this lawsuit was filed.[6]

On March 18, 2004, the complaint was served on McIntyre England in England under the provisions of the Hague Convention. (Appellants' N.J. Superior Ct. App. 76.) McIntyre England moved to dismiss on the grounds that the New Jersey court did not have personal jurisdiction over it. After the trial court dismissed the complaint (Pet. App. 159a), the court of appeals remanded the case for jurisdictional discovery (Pet. App. 157a), which revealed the essential jurisdictional facts of this case, including the fact that McIntyre England is defending and has defended several other cases in various states around the country, (J.A. 145a-152a); *see also Whitaker v. J. McIntyre Machinery, Ltd.*, No.

received before he can keep any of his recovery from this lawsuit *See* N.J. Stat. Ann § 34:15-40 (West 2010); *Frazier v. New Jersey Mfrs Ins. Co.*, 667 A 2d 670 (N.J. 1995).

[5] Mrs. Nicastro recently passed away. Mr. Nicastro is seeking to be appointed administrator *ad prosequendum* under New Jersey law and, upon appointment, anticipates making an appropriate motion under Supreme Court Rule 35 to substitute himself, in capacity as administrator, as a party

[6] Even if McIntyre America still existed, it likely would not be liable under New Jersey law for the design defect claim asserted here against McIntyre England N.J. Stat. Ann. § 2A:58C-9 (West 2010).

2003-CA-001429, 2004 WL 1586989 (Ky. Ct. App. July 16, 2004) (in which personal jurisdiction over McIntyre England was exercised in Kentucky when one of its shears injured a worker). McIntyre England again moved to dismiss the complaint, and the trial court again granted McIntyre England's motion. (Pet. App. 110a.)

On April 9, 2008, the Superior Court of New Jersey, Appellate Division, unanimously held that sufficient minimum contacts exist under the "stream-of-commerce-plus" rationale espoused by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). (Pet. App. 74a.) Following this Court's "stream-of-commerce" jurisprudence, as well as binding precedent from the New Jersey Supreme Court on the "stream-of-commerce" theory of personal jurisdiction, the Appellate Division found that McIntyre England purposefully established a distribution scheme by which McIntyre America would serve as its conduit for sales of McIntyre England's products in all fifty states, including New Jersey. (Pet. App. 96a, 98a, 105a.) In doing so, McIntyre England purposefully availed itself of the benefits and protections of all fifty states. (*Id.*) Additionally, McIntyre England designed the 640 shear to conform to U.S. specifications and requirements, and senior personnel attended national trade shows in the U.S. in an effort to make sales to customers in any or all of the fifty states. (Pet. App. 96a.) The court further concluded that exercising jurisdiction over McIntyre England in New Jersey would not offend traditional notions of fair play and substantial justice. (Pet. App. 108a.)

McIntyre England petitioned the New Jersey Supreme Court for review. (J.A. 3a.) McIntyre England suggested at oral argument that there was likely personal jurisdiction over it in Ohio (J.A. 167a-168a), and that in terms of hardship or unfairness to McIntyre England, it made no difference to McIntyre England whether the case was litigated in Ohio or New Jersey. (J.A. 174a-175a).

While the New Jersey Supreme Court found that "minimum contacts" in the traditional sense, as outlined by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), were not present, it held that the "stream-of-commerce theory" of specific personal jurisdiction, as outlined by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and as adopted by the New Jersey Supreme Court in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986), applied in this case to bring McIntyre England within the jurisdiction of New Jersey state courts. (Pet. App. 31a-32a, 38a-42a.) The court affirmed its decision in *Charles Gendler* and held "that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to in personam jurisdiction of a New Jersey Court in a product-liability action." (Pet. App. 31a.)

After an exhaustive review of this Court's jurisprudence of specific jurisdiction (Pet. App. 15a-27a), the New Jersey Supreme Court reaffirmed its 1986 decision in *Charles Gendler*, and held that McIntyre England is subject to specific jurisdiction in New Jersey in this case because it knew or reasonably should have known that its distribution

scheme would make its products available to New Jersey consumers. (Pet. App. 31a, 38a-42a.) The court found that McIntyre England targeted the United States market for the sale of its products by engaging McIntyre America as its exclusive U.S. distributor for seven years. (Pet. App. 38a-39a.) The court also found that McIntyre England and McIntyre America worked together to promote and sell McIntyre England's products in the United States, and that McIntyre America earned commissions from McIntyre England for the sale of McIntyre England's products. (Pet. App. 40a.) While acknowledging that a manufacturer wishing to avoid being haled into New Jersey courts "must take some reasonable step to prevent the distribution of its products in th[e] State" (Pet. App. 38a), the court found nothing in the record to suggest that McIntyre England had taken any such steps. (*Id.*) In the absence of any such steps, it concluded that a manufacturer "cannot shield itself merely by employing an independent distributor—a middleman—knowing the predictable route the product will take to market." (Pet. App. 37a-38a.) The court further held that McIntyre England did not demonstrate that defending the suit in New Jersey would offend traditional notions of fair play and substantial justice. (Pet. App. 40a-41a.)

SUMMARY OF ARGUMENT

The machine that injured Mr. Nicastro weighs three tons and costs twenty-five thousand dollars. Heavy industrial machines like it are not sold through local merchants, like the car involved in *World-Wide Volkswagen*; they are sold at national trade shows. That is where McIntyre England peddled them, knowing that they would be

purchased for delivery to business places around the country.

There is nothing remarkable about New Jersey's exercise of specific jurisdiction over McIntyre England. Specific jurisdiction over a manufacturer of finished products is permissible when the manufacturer "'delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Asahi*, 480 at 109 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98). The Court in *World-Wide Volkswagen* was talking about manufacturers of finished goods. Its admonition became clouded when, in *Asahi*, the Court struggled with the question of whether the admonition applied with equal force to a foreign manufacturer of component parts on a cross-claim, by another foreign manufacturer, for indemnification. This case does not involve component parts and it does not involve an indemnification claim. It involves a finished product and manufacturer who delivered it with the expectation it would be purchased anywhere in the United States, just like the manufacturer of the finished tire over whom jurisdiction was exercised in *Asahi* and the manufacturer of the finished automobile over whom jurisdiction was exercised in *World-Wide Volkswagen*.

McIntyre England had clear notice, from numerous American judicial decisions, that, on the basis of its conduct, it could be haled into court where its products were sold and caused harm. McIntyre England's worldwide distribution of machines created an expectation that it could be haled into court in any state of a federated nation-

state in which its product causes harm. The law of McIntyre England's domicile and the only extant multilateral international treaties governing adjudicative jurisdiction prescribe that result. Those laws indicate that a judgment rendered in New Jersey would be enforceable and final, a venerable concern.

McIntyre England contends that due process constrains the exercise of sovereign power outside of territorial boundaries. Territoriality is not textually or historically linked to due process values. This Court in *Pennoyer v. Neff*, 95 U.S. 714 (1877) did forge such a link, but the Court severed it, long ago, in *International Shoe*.

In affording a forum in this case New Jersey was discharging a constitutional duty and implementing Respondents' fundamental constitutional right of access to courts. The fundamental constitutional values involved weigh heavily in favor of upholding a state's exercise of its sovereign power.

An otherwise just exercise of jurisdiction can be precluded if well-recognized factors that further assure fairness so require. In *Asahi*, those factors precluded exercise of jurisdiction because neither the disputants nor the dispute was significantly connected to the forum. That is not the case here, where a New Jersey resident who worked in New Jersey and was injured at work sued in New Jersey. McIntyre England has otherwise not challenged in this Court the lower court's finding that the exercise of jurisdiction here comports with traditional notions of fair play and substantial justice.

McIntyre England's purposeful conduct linked it to New Jersey. The activities it sought to have occur in New Jersey caused injury there. A New Jersey resident sued it there, over those injuries. Charged with knowledge of the law and knowing from experience that it was amenable to this kind of suit in state courts in the United States, McIntyre England was capable of structuring its affairs to avoid jurisdiction. It did not. The Due Process Clause does not preclude New Jersey from requiring McIntyre England to answer Respondents' claim.

ARGUMENT

I. MCINTYRE ENGLAND HAD SUFFICIENT CONTACTS WITH NEW JERSEY SUCH THAT THE DUE PROCESS CLAUSE DOES NOT PRECLUDE NEW JERSEY FROM REQUIRING IT TO DEFEND THIS TORT SUIT THERE

New Jersey's exercise of personal jurisdiction in this case is consistent with this Court's due process precedents, which permit a State to hale a foreign manufacturer into its courts where the manufacturer places its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state, and the product causes injury there. It is unremarkable, consistent with decisions over the last two decades in which state and federal courts have exercised jurisdiction in virtually identical factual circumstances. These decisions, and the decisions of this Court, gave McIntyre England fair warning that it could be haled into a New Jersey court to defend a suit on the facts of this case.

A. McIntyre England Purposefully Marketed Its Product Nationwide and Put Its Product into a Distribution Scheme for National Sales.

In *World-Wide Volkswagen*, the Court recognized that the stream-of-commerce theory can provide a constitutionally sufficient basis for the exercise of personal jurisdiction over a foreign manufacturer. 444 U.S. at 297-98. In that case, New York residents were injured in an automobile accident while driving through Oklahoma on the way to their new home in Arizona in a car they had purchased in New York. The plaintiffs sued the manufacturer, importer, regional distributor, and retail dealer, alleging that the car was defectively designed. The manufacturer and importer did not contest personal jurisdiction, but the regional distributor and retail dealer did. The Court held that, because the distributor and retailer conducted no activities in Oklahoma, they could not be subject to suit there. It found that the regional distributor's and retail distributor's only connection with Oklahoma was that they had sold a car to the New York plaintiffs in New York, who were then injured while driving the car through Oklahoma. That connection was constitutionally insufficient, the Court determined, to support haling them into court in Oklahoma.[7] It did not matter to the Court whether

[7] While jurisdiction was presumably proper at least in New York, ensuring that there was a forum somewhere in the United States for redress of the *World-Wide Volkswagen* plaintiffs' injuries, McIntyre England's brief here suggests that no state in the nation would have jurisdiction over it under these facts.

it was *in fact* foreseeable to these defendants that the Court might be driven to Oklahoma. The Court explained, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 287.

Based on this understanding of foreseeability, the Court ruled that, consistent with due process, a manufacturer or national distributor of products could be subject to personal jurisdiction in the states which comprise the market for its products. In the Court's words:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297-98. Applying this rule, the Court concluded that the stream-of-commerce theory could not subject the *retailer* and *distributor* to personal jurisdiction in Oklahoma, because the retail dealer's sales were made only in New York, and the regional distributor's market was limited to dealers in New York, New Jersey, and Connecticut.

This case involves a *manufacturer* of heavy industrial equipment, the analog of Audi, over which jurisdiction was exercised, and not the analog of the dealer over which jurisdiction was not permitted. The stream-of-commerce standard announced by the Court in *World-Wide Volkswagen* is readily met here, because in this case the sale of the shear to Curcio in New Jersey arose from the efforts of McIntyre England to serve a national market for its products. Thus, it is "not unreasonable to subject it to suit" in one of those states—here, New Jersey—where its allegedly defective shear caused an injury. *See id.*

The record is replete with evidence that the sale of the shear arose from McIntyre England's efforts to establish and foster a national market for the sale of its products through an exclusive distributor, McIntyre America. By its own admission, all McIntyre England wanted was to "sell [its] products in the United States—and get paid!" To that end, McIntyre England worked closely with McIntyre America to establish and foster a market for the sale of its products that would encompass all fifty states, with no effort to prohibit sales in New Jersey.

For instance, McIntyre England's employees, including its president, attended industry trade shows and conventions throughout the United States from at least 1990, prior to McIntyre England's association with McIntyre America, until at least 2005. High-level personnel from McIntyre England traveled from the United Kingdom to attend and exhibit their products at these trade shows, which took place across America in major convention locations on the East, West, and Gulf coasts and in inland locations like Las Vegas and San Antonio,

often working alongside McIntyre America. Thousands of professionals in the specialized industry of metal recycling traveled from all around the nation to attend these trade shows. At these shows, McIntyre England employees had direct contact with potential and actual American customers from around the nation. One notable example: McIntyre England's president attended the trade show where Mr. Nicastro's employer, Curcio, first learned of the J. McIntyre 640 metal shear. The promotion of the shear at this trade show culminated in a sale to Curcio in New Jersey. McIntyre England thus succeeded in establishing a market for its product for sale by McIntyre America in New Jersey, and it derived benefits from the indirect sale of its special-order products in the United States market.

That is not all. McIntyre England, in its effort to cultivate a national market in its products, designated McIntyre America its exclusive distributor in the United States and allowed McIntyre America to trade on the "McIntyre" name. McIntyre America was never an end-user of McIntyre England's products, but a distributor that served as McIntyre England's sales agent in New Jersey and every other state in the United States. If anyone in any state wanted to purchase a McIntyre England machine between 1994 and 2001, he or she was required to purchase it from McIntyre America

McIntyre America structured its advertising and sales efforts for McIntyre England's products in accordance with the "direction and guidance" of McIntyre England's president. (J.A. 124a.) McIntyre America's advertising of McIntyre England's products included the placement of full-page ads for the full line of McIntyre England's products in trade

publications in the United States. Its claim that it designed its product to satisfy American standards was designed to entice American consumers. Its instruction manual for American consumers not only bore its name, but provided its contact information. Indeed, the J. McIntyre 640 shear that injured Mr. Nicastro bore not only the model and serial numbers, but McIntyre England's name and contact information, as well; it did not, however, bear McIntyre America's information. (Appellants' N.J. Superior Ct. App. 138a.)

These purposeful acts of McIntyre England demonstrate that *it* intended to serve the national market, which by definition includes New Jersey. In response, McIntyre England argues that the New Jersey Supreme Court failed to consider whether "the putative defendant [was] aware of the forum state," thereby suggesting that, had the lower court so inquired, it would have learned that McIntyre England did not "even [know] that [New Jersey] exist[ed]." (Pet'r's Merit Br. 10, 29.) Particularly on this record, which demonstrates that McIntyre England's employees, including its president, traveled extensively throughout the United States to promote McIntyre England's products both before and after the sale of the shear in question here, it is unthinkable that it or any other sophisticated manufacturer would not know that the United States is comprised of states, including New Jersey, which "has always been a portal state." (Pet'r's Merit Br. 33.)

Although McIntyre England notes that its distributor—not it—sold and shipped the shear to New Jersey, suit in New Jersey was foreseeable even if McIntyre England did not know of this particular

sale. *World-Wide Volkswagen* states that fair warning must be assessed in view of a manufacturer's efforts to serve a market for products that are indirectly sold—and not simply in view of where the chattel could foreseeably end up. *See id.* at 296-97. In other words, the manufacturer's efforts to serve a large geographical market make it foreseeable that a distributor would sell the product to an individual within that market, regardless of in which state within the larger market the individual buyer is located. As discussed above, McIntyre England's own efforts to establish and foster a national market render the sale in New Jersey foreseeable. If, as the Court held in *World-Wide Volkswagen*, knowledge of where a chattel *could* foreseeably end up is not material to the fair warning inquiry, *id.* at 296, then actual knowledge also is not material. It would not have mattered in *World-Wide Volkswagen* if the local car dealership knew that the customer buying the car was traveling to Oklahoma; suit in Oklahoma still would have violated due process because the local dealership had made no effort, directly or indirectly, to serve the market in Oklahoma.

Unlike the local retailer or distributor at issue in *World-Wide Volkswagen*, whose distribution chain was constrained to a few states, McIntyre England did not seek to cultivate a local market covering, for example, Las Vegas or the other cities in which the trade shows took place, or Ohio, the location of its distributor; it sought to establish a national market for its products so that they could be sold throughout the country. The assertion of jurisdiction is consistent with McIntyre England's actions and a reasonable manufacturer's expectations.

McIntyre England criticizes the New Jersey Supreme Court for adopting, according to it, a rule of "non-purposeful availment" (Pet'r's Merit Br. 34) that imposes "jurisdiction by default" and then asks whether a defendant manufacturer sought to avoid a particular state. (*See* Pet'r's Merit Br. 15-16.) The lower court adopted no such rule. It simply noted that McIntyre England, after structuring its *primary* conduct to serve (indirectly) the market in each state, never then altered its conduct to exclude certain states. This is not "jurisdiction by default" (Pet'r's Merit Br. 15); it is jurisdiction based on McIntyre England's primary conduct.[8]

B. McIntyre England's Contacts Are Sufficient for the Exercise of Jurisdiction Under Both Plurality Opinions in *Asahi*.

Asahi also supports the exercise of jurisdiction by New Jersey here. The evidence in the record satisfies both stream-of-commerce tests articulated in *Asahi*, both which, at their core, recognize that a manufacturer makes minimum contacts with a forum when it seeks to serve, directly or indirectly,

[8] McIntyre England also states that there are practical difficulties in marketing products nationwide but then seeking to avoid the market of an individual state. Of course, if a manufacturer wanted to market its products in certain states but not others, one would not expect it *first* to adopt a nationwide marketing plan. Even so, McIntyre England could have instructed McIntyre America not to sell its shears in particular states or regions; and it could have indicated, on the machine itself, and in the documentation and instruction manual accompanying the shear, that sale was not intended or permitted in particular states. There are no obvious "practical" difficulties in taking these steps.

the market in the forum state and its product causes injury there.

In *Asahi*, the Court held that it is not reasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the non-resident defendant. In that case, a California plaintiff injured in a motorcycle accident brought a product liability action in California against Cheng Shin Rubber Ind. Co., Ltd. (Cheng Shin), the Taiwanese corporation that manufactured the allegedly defective motorcycle tire. Cheng Shin brought a third-party indemnification action against Asahi Metal, the manufacturer of the valve assembly on the tire. The plaintiff and Cheng Shin settled the plaintiff's tort claims, leaving only the indemnity action against Asahi, who contested jurisdiction in California. Asahi's sales of the valves occurred in Taiwan and Asahi had no control over the distribution system that brought its valves, as a component of the tires manufactured by Cheng Shin, into the United States. The Court unanimously agreed that the exercise of jurisdiction did not comport with "fair play and substantial justice," and was thus unreasonable and unfair under the due process clause. The Court was divided, however, over the proper test of the stream-of-commerce theory.

In discussing the stream-of-commerce theory, Justice O'Connor stated that, in her view, due process requires that the defendant's conduct "indicate an intent or purpose to serve the market in the forum State." 480 U.S. at 112 (O'Connor, J.). That statement of law is consistent with *World-Wide Volkswagen's* conclusion, which Justice O'Connor quoted approvingly, that a manufacturer makes minimum contacts with a forum when it seeks to

serve, directly or indirectly, the market in the forum state and its product causes injury there. *See id.* at 110 (O'Connor, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). She otherwise indicated that the placement of a product into the stream of commerce, without more, would not establish that the defendant's conduct was purposefully directed at a forum State. Additional conduct was required, such as "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112 (O'Connor, J.). Such conduct would also include "creat[ing], control[ing], or employ[ing] the distribution system that brought [the product] into" the forum state. *Id.* By contrast, "mere awareness" that a manufacturer's product in the stream of commerce might end up in the forum state was constitutionally insufficient to establish purposeful direction toward the forum. *Id.* at 112-13 (O'Connor, J.).

Justice Brennan, like Justice O'Connor, agreed with *World-Wide Volkswagen's* conclusion that a manufacturer makes minimum contacts with a forum when it seeks to serve, directly or indirectly, the market in the forum state and its product causes injury there. *See id.* at 119 (Brennan, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). But he rejected Justice O'Connor's view that due process required a showing of additional conduct. In his view, stream of commerce "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distributor to retail sale." *Id.* at 117 (Brennan, J.). Thus, purposeful availment is satisfied by the placement of a product in the stream of commerce with awareness that the final product is being marketed in the forum state. *Id.*

This case is not *Asahi*. We are not dealing with a cross-claim for indemnification between two foreign manufacturers, nor are we dealing with the manufacturer of a *component* part who had no control over the choice of distribution scheme that brought its product into the forum state.[9] In this case, the foreign manufacturer of a finished product, an allegedly defective machine, actively participated in the distribution scheme that brought its product into New Jersey where it injured Mr. Nicastro. McIntyre England also was plainly aware that its final product was being marketed in all fifty states, including New Jersey, when it placed its product into the stream of commerce, thus satisfying Justice Brennan's test.

Justice O'Connor's formulation described a non-exclusive list of additional conduct that may indicate a manufacturer's intent to serve the market of the forum state and would thus support the

[9] Amicus PLAC states that "this case could [not] possibly pass Justice Stevens's test, which would find purposeful availment where 'a regular course of dealing . . . results in deliveries [in the state] of over 100,000 units annually over a period of several years,'" because in this case there were only four sales of McIntyre England's shears to entities in New Jersey (PLAC Amicus Br. 21-22 (quoting *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment))). What PLAC ignores, however, is that Justice Stevens was suggesting that, in an appropriate case, the Court make "a constitutional determination [in view of] . . . the volume, the value, and the hazardous character of the *components*." 480 U.S. at 122 (emphasis added). This case, in contrast, does not concern component parts, and thus the figures Justice Stevens found to be sufficient in a case concerning component parts are not transferable to a case concerning a three-ton machine sold exclusively to discrete members of a small, highly specialized industry.

exercise of jurisdiction over the manufacturer. This included "creat[ing], control[ing], or employ[ing] the distribution system that brought [the product] into" the forum state. 480 U.S. at 112. Because Justice O'Connor found no evidence of this additional conduct in *Asahi*, she concluded that the assertion of jurisdiction did not satisfy the stream of commerce test. *See Id.* Justice O'Connor stated that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" can support a finding that the manufacturer purposefully availed itself of the laws of the forum state. *Id.* In *Asahi*, the valve manufacturer "did not create, control or employ the distribution system that brought its valves to California." *Id.*

In this case, McIntyre England did control the type of distribution system that brought its product into the forum state as it purposefully chose a distribution system that would target the entire United States. Even before appointing McIntyre America as its exclusive distributor in the United States, McIntyre England attended national industry trade shows to foster sales here. If McIntyre England wished only to target particular states, and thus avoid jurisdiction in others, it could have chosen a regional distributor or it could have directed McIntyre America to limit distribution to a particular area or exclude a particular state. Instead, McIntyre England authorized McIntyre America to market and sell McIntyre England's products across the nation, wherever there was a potential buyer. McIntyre America effectively served as McIntyre England's sales agent to New Jersey and every other state in the United States. McIntyre England's own conduct suffices to meet the jurisdictional test articulated by Justice O'Connor, because McIntyre

England controlled the choice of and employment of the distribution scheme that brought its product to the forum state of New Jersey. McIntyre England's conduct indicates "an intent or purpose to serve the market in the forum state" because it "market[ed] the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112.

In addition, McIntyre England directed and guided McIntyre America's advertising and sales efforts in the United States. McIntyre England maintained a close working relationship with McIntyre America to facilitate the sale of McIntyre England's products throughout the nation, and even arranged visits of McIntyre England personnel to McIntyre America to help liquidate its stock. Furthermore, McIntyre England retained ownership of its products in McIntyre America's possession until McIntyre England received payment in full for the machines. McIntyre England didn't simply sell its products to McIntyre America, which McIntyre America then sold to end users; McIntyre England paid McIntyre America a commission for the sales of McIntyre England machines. Finally, McIntyre England's product liability insurance covered the products that McIntyre America distributed throughout the fifty states, including the machine that caused Mr. Nicastro's injuries in this case. In short, McIntyre England's relationship to the products that it sent to its exclusive distributor in the United States did not end when McIntyre England put those machines in a container in the United Kingdom.

McIntyre England's assertion that it did not have actual knowledge of each individual product's

sale, even if true, does not mean that it cannot be said to have controlled distribution. (*See* Pet'r's Merit Br. 42 (stating that it lacked "specific awareness that the product was being sold into the forum state").) Justice O'Connor's test does not require actual knowledge of where a particular product is going. This is evident because, prior to discussing control of distribution, Justice O'Connor cited *World-Wide Volkswagen* for the view that it is not constitutionally relevant whether a manufacturer could foresee where a particular chattel ends up. 480 U.S. at 109-10 (O'Connor, J.). To Justice O'Connor, the constitutionally relevant question was whether a manufacturer's actions evidenced "an intent or purpose *to serve the market* in the forum state." *Id.* at 112 (O'Connor, J.) (emphasis added). McIntyre England's actions in this case do in fact evidence its intent to serve a national market, which necessarily includes New Jersey, even assuming it lacked actual knowledge that this particular shear was being sold to Curcio in New Jersey.

There are sound reasons to adhere to the rule that a defendant manufacturer that intends to serve, directly or indirectly, a market in the forum state may be sued there if its product injures an individual in the forum. First, looking to the direct or indirect actions of a manufacturer to serve a particular market in a particular region is consistent with this Court's requirement that the substantial connection between a defendant and a forum state must be based on the actions of the defendant. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475-76 (1985). Unlike local and retail distributors, which are at the end of the distribution chain, "manufacturers and distributors, which are at the start of a distribution chain, serve a larger market and 'purposely conduct

their activities to make their product available for purchase in as many forums as possible.'" *Charles Gendler*, 508 A.2d at 1136 (citation omitted) (explicating the rationale of *World-Wide Volkswagen*). A sale by such a manufacturer in a particular state is not an isolated incident "but the result of the corporation's efforts to cultivate the largest possible market for its product." *Id.* Also, such manufacturers derive economic benefits from indirect sales to forum residents, and they benefit from the legal protections provided by the laws of the forum state. *See Burger King*, 471 U.S. at 475-76. Accordingly, it is fair to subject such manufacturers to jurisdiction in states which comprise the market they intend to serve.

Second, looking both to direct *and indirect* action is consistent with stream-of-commerce theory generally, which by definition "involves a sale *not* by the manufacturer, but by another entity in the chain of distribution." *Charler Gendler*, 508 A.2d at 1138 (emphasis added). As the New Jersey Supreme Court explained in discussing *World-Wide Volkswagen*, foreign manufacturers rarely deliver products directly to consumers in the United States, but instead employ middlemen, many of whom are independent, for distribution purposes. *Id.* at 1136.

> To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit "a legal technicality to subvert justice and economic reality in the worst sense." Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution

> or by professing ignorance of the ultimate destination of their products.

Id. at 1137 (citation omitted). Accordingly, the indirect actions of a manufacturer to serve the market in a forum state, no less than its direct actions, are sufficient to establish the reasonableness of a state's assertion of personal jurisdiction.

Third, and lastly, the rule is fully consistent with this Court's precedents, *see World-Wide Volkswagen*, 444 U.S. at 297, and with both plurality opinions in *Asahi*. McIntyre England criticizes Justice Brennan's analysis in *Asahi* and exalts Justice O'Connor's. (*E.g.*, Pet'r's Merit Br. 39-49.) Though these Justices disagreed in that case concerning a cross-claim for indemnification between two foreign manufacturers, one of which manufactured a component part, neither disagreed that a foreign manufacturer makes minimum contacts with the forum when it seeks to serve—directly or indirectly—the market in the forum state and its product thereby causes injury in that state. *See* 480 U.S. at 110, 112 (O'Connor, J.); *id.* at 119 (Brennan, J.). In view of the record in this case, and under the rationale of either Justice, McIntyre England intended to serve the market for its products in New Jersey and thus may be sued there consistent with due process.

C. A Finding of Minimum Contacts Here Is Consistent with the Principle of Fair Warning.

There is nothing remarkable about New Jersey exercising jurisdiction over McIntyre England under a stream of commerce theory, either as

described by this Court in *World-Wide Volkswagen*, or by Justice O'Connor or Justice Brennan in *Asahi*. Despite its assertions to the contrary, McIntyre England had fair warning that its use and direction of a sales and marketing scheme that sought to distribute its products to each of the fifty states would subject it to specific jurisdiction in any state where its products caused injury. Apart from the notice provided by *World-Wide Volkswagen* and both plurality opinions in *Asahi*, numerous lower courts have, based on facts similar to the facts in this case, exercised jurisdiction over foreign manufacturers under state long-arm statutes. Indeed McIntyre England has itself been a party to several suits in the United States (J.A. 145a-152a), and has defended, in Kentucky, a suit similar to this one, initially contesting service under the Hague Convention but, after service was perfected, subsequently answering the complaint and challenging the suit on the merits. *Whitaker v. J. McIntyre Machinery, Ltd.*, 2004 WL 1586989, at *2.

McIntyre England had fair warning since 1986 that, pursuant to New Jersey's long-arm statute, which extends to the limits of due process, a foreign manufacturer could be haled into New Jersey provided the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state. *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1137 (N.J. 1986) Although *Charles Gendler* was decided one year prior to *Asahi*, New Jersey confirmed the *Charles Gendler* approach after *Asahi* as well. *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 649 A.2d 379, 387 (N.J. 1994). Despite the clear state of the law in New Jersey, at no point did McIntyre England seek to "alleviate the

risk of burdensome litigation" there. *World-Wide Volkswagen*, 444 U.S. at 297.

At issue in *Charles Gendler* was whether a foreign manufacturer could be haled into New Jersey state court to defend a breach of contract claim arising from the sale of an allegedly defective telephone system. In that case, Nippon, a Japanese corporation with its principal place of business in Tokyo, manufactured telephone and other electronic equipment. It sold its equipment to a wholly-owned subsidiary, NEC America, Inc., which was authorized to do business in New Jersey and in turn wholly owned another subsidiary, NEC Telephones, Inc. The plaintiff, Gendler, bought a Nippon-manufactured phone system from Telecom Equipment Corporation, a New Jersey corporation with its principal place of business in Long Island, New York, which had purchased the phone from NEC Telephones. Alleging that the system was defective, Gendler filed suit against Nippon and Telecom for breach of contract and breach of warranty. Nippon challenged personal jurisdiction.

The New Jersey Supreme Court, based on its reading of *World-Wide Volkswagen*, held that "[a]s applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." *Id.* at 1137. After adopting this stream-of-commerce theory, it then remanded for jurisdictional discovery.

The decision in *Charles Gendler* is one of several examples in which courts have held that conduct similar to McIntyre England's in this case,

was sufficient to support specific jurisdiction over foreign manufacturers. The court itself cited six cases supporting that view. *Id.* at 1137 (collecting cases). In addition, other state and federal appellate courts have found that such conduct supports personal jurisdiction under similar circumstances.[10] For instance, in *A. Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995), an Italian gun manufacturer's intent to sell its product "across America" justified a finding of jurisdiction in Arizona. *Id.* at 1362-64. In that case, parents of a two-year-old who was fatally shot in a handgun accident in Tucson, Arizona, sued the Italian manufacturer of the gun in Arizona. The manufacturer knowingly and intentionally manufactured its products for the United States, and exported to the United States through its independent American distributor, knowing that its product would flow into local markets across America. The court noted:

> Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona,

[10] Of the cases to be discussed, all preceded the sale of the shear at issue here in 1995, except for *A Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995), and *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999). These cases are nonetheless instructive because McIntyre England never altered its conduct to "alleviate the risk of burdensome litigation" in these states or regions *World-Wide Volkswagen*, 444 U.S. at 297

> Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America.

Id. at 1362.

On similar facts, the Eighth Circuit in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, found jurisdiction over a Japanese fireworks manufacturer in Nebraska, the place of harm, because the manufacturer sold its products throughout the United States, including Nebraska, using regional distributors. 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994), . The court held that personal jurisdiction in Nebraska was proper because the Japanese manufacturer reaped the benefits of its distributors, and had purposefully reaped the benefits of the laws of Nebraska. *Id.* at 615. Even though the Japanese company claimed to have no actual knowledge that fireworks were distributed into Nebraska, the court said that such ignorance "defies reason and could aptly be labeled 'willful,'" in part because the location of its distributors suggested an effort to reach much of the country through a limited number of regional distributors. *Id.* at 613. The court held that it was only reasonable and just that the Japanese manufacturer should be held accountable in the forum of the plaintiff's choice. *Id.* at 615

Again, on facts similar to those in this case, national marketing and sales served as the basis for New York's exercise of personal jurisdiction over a Japanese manufacturer in *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999). The Japanese manufacturer's machine caused plaintiff's injuries in

New York after the manufacturer's distributor in Pennsylvania sold the machine to plaintiff's employer in New York. The Second Circuit held that an "exclusive sales rights" agreement between the Japanese manufacturer and the Pennsylvania company—an agreement analogous to the one here—contemplated that the Pennsylvania company would sell the machines in North America and throughout the world, and served as evidence of the Japanese company's attempt to serve the New York market, albeit indirectly. *Id.* at 242-44.

Efforts to serve the U.S. market were equated with purposeful availment "of the vast, lucrative markets of *each state* in the United States" in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543 (6th Cir.) (emphasis added), *cert. denied*, 510 U.S. 914 (1993) (relying on Justice O'Connor's opinion in *Asahi*). The plaintiff filed a products liability claim in Kentucky against the Dutch manufacturer of a drug distributed nationwide by an American company. The product was designed for the U.S. market, the Dutch manufacturer sought and approved regulatory approval to sell the product in the United States, and the Dutch manufacturer used a distributor that would market the drug throughout the United States. *Id.* at 543-44. The Sixth Circuit found that these factors indicated intent to serve "each state," including the forum state, Kentucky. *Id.* at 544.

The West Virginia Supreme Court of Appeals similarly found that a Japanese manufacturer of a tainted drug which allegedly caused plaintiff's blood disorder should have an expectation of being haled into court in West Virginia. *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609 (W. Va. 1992). The

manufacturer solicited business in West Virginia through a distributor and derived substantial benefit from the use of its product in that state. "Given the distribution pattern of the product, this and the many other lawsuits filed as a result of the use of the contaminated L-tryptophan cannot come as a surprise." *Id.* at 616 (citing *Asahi*, 480 U.S. at 117).

These cases demonstrate a significant consensus that the ruling in *Charles Gendler* is correct and that McIntyre England had fair warning, both before and after this Court decided *Asahi*, that it could be haled into court in New Jersey if it employed a distribution scheme for its products that targeted each of the fifty states, and its product caused harm there.

To undermine the consensus, McIntyre England focuses on a single case involving an attempt to obtain jurisdiction over a company that supplied component parts—filters—to a cigarette manufacturer, not a company, like McIntyre England, that manufactures a finished product for sale through an exclusive distributor to end users. (Pet'r's Merit Br. 26 (citing *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940 (4th Cir. 1994)).)[11] Given this difference, and the fact that here there are many other contacts that McIntyre England had with New Jersey in connection with the sale of

[11] In citing *Lesnick*, McIntyre England fails to note that the Louisiana Supreme Court, under virtually identical facts, upheld personal jurisdiction over the very same defendant for the very same conduct *See Ruckstuhl v. Owens Corning Fiberglas Corp* , 731 So. 2d 881, 890 (La. 1999).

equipment of the kind that injured Mr. Nicastro, *Lesnick* is not instructive.[12]

II. THERE ARE NO REASONS FOR BARRING NEW JERSEY FROM EXERCISING SPECIFIC JURISDICTION OVER MCINTYRE ENGLAND

A. The Assertion of Jurisdiction Here Does Not Interfere with International Relations.

McIntyre England contends that its conduct does not satisfy constitutional standards of jurisdiction because the exercise of jurisdiction by New Jersey would impermissibly interfere with interstate and international relations. (Pet'r's Merit Br. 9, 37.)

New Jersey's sovereign assertion of jurisdiction is consistent with a world consensus on fair procedure. It in no way interferes with international relations, and it does not represent "parochialism [that] threatens our relationship with other countries and their judicial systems." (Pet'r's Merit Br. 37.)

[12] Even on its own terms, the Fourth Circuit's decision is flawed; for instance, its reliance on *Pennoyer* and on *dicta* in *World-Wide Volkswagen* to support the assertion that due process precludes extraterritorial effects of state action is unsupportable given this Court's rejection of that view in *Insurance Corp. of Ireland v. Compagnie Des Bauxites Guinee*, 456 U.S. 694, 703 (1982) and *Burger King*, which the court in *Lesnick* ignored. Its conclusion that *no state in the nation* would have jurisdiction over a manufacturer that worked to develop and market its product nationwide and penetrated the market to the tune of 13 billion cigarettes cannot be correct

The sources McIntyre England and its *amici* cite with regard to international concerns about United States jurisdictional law deal primarily with general jurisdiction and transient jurisdiction, not specific jurisdiction exercised over tort claims brought in the place where harm occurred.

For example, McIntyre England quotes a law review article for the proposition that foreign courts are reluctant to enforce U.S. judgments because of a generous attitude in the U.S. toward personal jurisdiction. (Pet'r's Merit Br. 37 (quoting Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 51 (2006)).) The text following the quoted text, however, does not condemn jurisdiction exercised under the facts present here, but does note that "the rest of the world generally characterizes 'tag' or transient jurisdiction as exorbitant." *Id.* at 52-53; *see also* Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429, 511 (2003) ("Many other countries find some of the grounds for jurisdiction in the United States exorbitant (particularly the notion of 'tag' jurisdiction based on a transient presence in the United States and general 'doing business' jurisdiction when the business transacted in the United States is not particularly related to the dispute.")); *Restatement (Third) of the Foreign Relations Law of the United States* § 421 cmt. e (1987) ("'Tag' jurisdiction, i.e., jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law.").

Similarly, U.S. standards for general jurisdiction, but not for specific jurisdiction, have

been criticized for creating difficulties in U.S. foreign relations. *See, e.g.*, Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161-62 (2001) ("[T]he broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law."); Brief of United States as *Amicus Curiae* Supporting Pet'rs, *Goodyear Luxemberg Tires, S.A. v. Brown*, No. 10-76, 2010 WL 4735597, at *32-*33 (U.S. Nov. 19, 2010).

A principal source cited by McIntyre England's *amici* Organization for International Investment and Association of International Automobile Manufacturers Inc. ("OFII") (OFII Amicus Br. 4-5, 10), reports that overseas investors dislike the U.S. legal system in general, a feeling Petitioner pointedly shares: "American law—who needs it?!" (J.A. 130a.) But that report does not criticize U.S. jurisdictional rules, in particular. *See* Charles G. Schott, U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 5-6 (Oct. 2008), *available at* http://www.calchamber.com/International/Trade/Documents/LitigationEnvironment.pdf. In fact, the report advises that not even the decried U.S. legal environment is an insurmountable hurdle.

> Those who invest in the United States take comfort in understanding that (a) everyone competing in the market faces these factors; (b) the factors can be handled with strong local management and legal, accounting, and banking

> relationships; and (c) other international investors have adjusted to these factors.

Id. at 3. And it makes a critical point about fairness: domestic manufacturers are subject to the same legal environment. A foreign manufacturer peddling its wares in America and escaping accountability here for harms it causes here would have a distinct competitive advantage over domestic manufacturers. Nothing in due process supports that outcome.

There are two multilateral international instruments dealing with the reciprocal enforcement of judgments, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EEC-EFTA, Sept. 16, 1988 (Lugano Convention), *available at* http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm, and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968 (Brussels Convention), *available at* http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm. Article 31 of each convention makes judgments rendered in accordance with the terms of the convention reciprocally enforceable in subscribing states.[13]

[13] The conventions are supplemented by the European Union's *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Dec. 22, 2000), *available at* http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044.EN:NOT

The regulation recites at Article 38 the same standard for enforcement as contained in the Conventions and at Article 5(3) the same standard of tort jurisdiction, discussed *infra*.

The United Kingdom, McIntyre England's domicile, is a party to both conventions. Together, they apply to all the nations of the European Union and the European Free Trade Area. Within those nations they render McIntyre England amenable to jurisdiction in any court of any jurisdiction in which its products cause harm. Article 5, Section 3, of each treaty provides:

> A person domiciled in a Contracting State may, in another Contracting State, be sued,
>
> > 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

The language does not limit the jurisdiction of the courts of sub-states (like New Jersey) of federated nation-states (like the United States, or like Germany and Switzerland, which are parties to the regime). The place of harm determines jurisdiction.

The basis of tort jurisdiction established as fair by the Brussels regime is consistent with world thinking generally as reflected in *Restatement (Third) of the Foreign Relations Law of the United States* § 421(2)(i), (j), (k) (1987)[14]:

Together, the three enactments are referred to as the Brussels regime

[14] For example, the domestic law of the People's Republic of China, a rising trading power, employs the same formula for tort jurisdiction as the Brussels regime *See* Civil Procedure Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress,

> (2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:
>
> > (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
> >
> > (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or
> >
> > (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

The domestic law of McIntyre England's domicile adopts the same jurisdictional rule and creates the same expectation in a reasonable observer. The Civil Procedure Rules 1998 of the Supreme Court of England and Wales, Statutory Instrument 1998 (No. 3132 L.17), as amended, provide at CPR 6.20, in relevant part:

Oct. 28, 2007, effective Apr. 9, 1991) Article 29 (2007), *available at* http //www.lawinfochina.com/law/display asp?db=1&id=6459

> a claim form may be served out of the jurisdiction with the permission of the court if–
>
> Claims in tort
>
> (8) a claim is made in tort where–
>
> (a) damage was sustained within the jurisdiction;

New Jersey's exercise of jurisdiction is consistent with the law of nations and provides finality, venerated values in assessing jurisdiction. *See Rose v. Himely*, 8 U.S. 241, 243 (1808) (when considering whether to enforce a judgment by comity, whether foreign court exercises jurisdiction "*consistently with the law of nations*" is key to whether enforcement is granted and finality realized) (emphasis in original).

B. The Exercise of Jurisdiction by New Jersey Would Not Interfere with Interstate Relations Because Territoriality and Federalism Do Not Operate as Independent Restrictions on a State's Exercise of Jurisdiction.

McIntyre England argues that due process requires "restricting a state's exercise of sovereignty to its territory." (Pet'r's Merit Br. 25.) It suggests that its contacts with New Jersey prior to litigation are constitutionally insufficient because it had similar, if not the same, contacts with other states. It further suggests that the exercise of jurisdiction by New Jersey would impermissibly interfere with the

sovereign interests of the other forty-nine states—interference that it claims exists even though in its briefing it fails to identify a single other state in the nation in which this suit could be heard.

There is nothing extraterritorial about New Jersey exercising jurisdiction over an injury to a New Jersey citizen in New Jersey caused by McIntyre England's product which had been sent to that state. Even so, due process does not impose territorial limitations that make a defendant's pre-litigation contacts with one state constitutionally deficient because they mirror its contacts with other states Neither the text of the Clause, nor its history or purpose, support McIntyre England's assertion, nor do this Court's precedents. *See Ireland*, 456 U.S. at 703 (finding that the sine qua non of due process is liberty, not federalism); *Burger King*, 471 U.S. at 472 n.13 (same). Contrary to Petitioner's argument that territoriality is the "sine qua non" of personal jurisdiction (Pet'r's Merit Br. 40), for cases involving absent nonresident defendants, territoriality is, and should remain, a shibboleth.[15] *See Burnham*, 495 U.S. at 621 (distinguishing between due process standards for evaluating assertions of state-court jurisdiction against absent nonresident defendants and resident defendants or defendants present in the territory of the forum state).

[15] *See World-Wide Volkswagen*, 444 U.S. at 494 This is especially true for corporations, like Petitioner, which "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person'" *Burnham v. Superior Court*, 495 U.S 604, 610, n 1 (1990) (plurality opinion)

The texts of the Fifth and Fourteenth Amendments' Due Process Clauses make no mention of territory. *See* U.S. Const. amend. V, XIV. Territoriality was not a concern of English due process, from which our due process clauses came. Martin H. Redish, *Due Process: Federalism, And Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1122 (1981) (hereinafter "Redish"). The central, if not exclusive, concern of due process in the Fifth Amendment was "secur[ing] the individual from the arbitrary exercise of the powers of government." *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (per Johnson, J.), *cited with approval in County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Federalism, which Petitioner connects with territoriality, could not have been its concern, as it limited the power of Congress over individuals, not states, and did not limit state power. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1883) (concluding that the Bill of Rights applies only to the federal government).

The Fourteenth Amendment, which closely parallels the Fifth, does not indicate that its Framers conceived of a more direct link between due process and territory.[16] When the amendment was adopted there was hardly any discussion of due process itself, R. Mott, *Due Process of Law* 164 (1925), and nothing

[16] As Professor Redish has explained, "[j]udicial decisions recognizing limitations on the reach of a state's personal jurisdiction in the pre-Civil War United States were not based on constitutional principles. These decisions all represented exceptions to the dictates of the full faith and credit clause, ..." Redish, *supra*, at 1123; *see, e.g., D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850) (drawing on principles of international comity, and treating such principles as exceptions to the full faith and credit clause).

in that scant discussion suggests that the Framers of the Fourteenth Amendment intended to alter existing conceptions of due process, Redish, *supra*, at 1125 n.91.

Subsequently, in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), this Court read a certain notion of territory into the Due Process Clause of the Fourteenth Amendment, concluding that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[17] But it later abandoned that "shibboleth." *World-Wide Volkswagen*, 444 U.S. at 293. Dicta in *Hanson v. Deckla*, 357 U.S. 235 (1958), and *World-Wide Volkswagen* suggest that territorial concerns could operate as an independent restriction on a forum's exercise of jurisdiction. *See Hanson*, 357 U.S. at 251 ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are the consequence of territorial limitations on the power of the respective States."); *World-Wide Volkswagen*, 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the Due Process Clause, acting as an

[17] The Court imported this idea of territoriality from international sovereignty theories of French and Dutch continental scholars, rather than from our English heritage of due process, which does not evidence such concerns. *See* Geoffrey C Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 258-59 (1965). *See also* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction. The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956) (noting that physical power over an individual was not, at common law or in early American practice, a prerequisite to jurisdiction over the person, particularly in claims by citizens of the forum for harm realized in the forum)

instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."). But this Court itself has since clarified that due process limitations on personal jurisdiction ultimately concern liberty, not territoriality. *Ireland*, 456 U.S. at 703; *Burger King*, 471 U.S. at 13; *Omni Capital Int'l, Ltd. v. Rudolf Wolf & Co., Ltd.*, 484 U.S. 97, 104 (1987); *see Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977) (explaining that "central concern" of personal jurisdiction is the "relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest"); *id.* (explaining that "[t]he *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of the respective States,' . . . simply makes the point that the States are defined by their geographical territory").

Contrary to McIntyre England's assertion that territoriality is the sine qua non of due process in personal jurisdiction cases (Pet'r's Merit Br. 25), this Court's case law, and the text and history of the Fourteenth Amendment's Due Process Clause, refute its argument that territoriality (or federalism) should operate as an independent restriction on state power that would render constitutionally insufficient its pre-litigation contacts with New Jersey because it had similar, if not the same, contacts with other states.

C. New Jersey's Discharge of One of the "First Duties" of Any State Supports Its Exercise of Jurisdiction.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The right to call on a government to resolve disputes is a fundamental term of the social contract. When a state affords a forum to one of its own citizens, injured in that state, it is discharging this fundamental duty:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (citations and quotation omitted); *see Burger King*, 471 U.S. at 473 ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citation and internal quotation marks omitted)); *Charles Gendler*, 508 A.2d at 1139 ("A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.") It also

implements the fundamental right of access to courts. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.")

As a matter of its own policy, New Jersey has a considerable interest in providing a forum to those of its citizens who are employed and sustain industrial injuries there. *Cruz v. Robinson Eng'g*, 600 A.2d 1238, 1242-43 (N.J. Super Ct. App. Div.), *certif. denied*, 611 A.2d 648 (N.J. 1992). As the place of harm, New Jersey supplies the substantive law in this action. *See Cruz*, 600 A.2d 1238, 1242-43; N.J. Stat. Ann. § 2A:58C-1 *et seq.* (West 2010). Additionally, New Jersey has an interest in the smooth operation of its workers' compensation scheme, which requires Mr. Nicastro to re-pay his employer's insurance carrier 66 percent of all the benefits he received before he can keep any of his recovery from this lawsuit, should he ever recover anything from McIntyre England. *See* N.J. Stat. Ann. § 34:15-40; *Frazier v. New Jersey Mfrs. Ins. Co.*, 667 A.2d 670 (1995).[18]

[18] New Jersey also is the most convenient forum. Both the machine that caused the injury and Mr. Nicastro are located in New Jersey, and the accident occurred there. Mr. Nicastro's employer, doctors, and medical records are all located in New Jersey. In fact, most, if not all, of the evidence in this case, including fact and expert witnesses, is located in New Jersey. The lower court found that that the extensive presence of McIntyre England's representatives all over the United States made it impossible for it to claim that New Jersey was an inconvenient forum, "that travel to New Jersey is onerous or an unfair burden for it to bear." (Pet. App. 41a.)

The Court's instruction in *International Shoe*, 326 U.S. at 319, to measure the "quality and nature" of activity that permissibly gives rise to jurisdiction "in relation to" concerns regarding the orderly administration of laws, requires deference to the purpose New Jersey was serving in affording a forum. A state's offer of a forum in a situation like this one simply recognizes legitimate local interests and demonstrates no ill-will or unfairness toward a foreign defendant. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947). Thus, although the minimum contacts demonstrated above are more than constitutionally sufficient, the state's compelling interest in affording a forum in a personal injury case helps render the "quality and nature" of McIntyre England's contacts with the forum sufficient to support New Jersey's exercise of personal jurisdiction in this case. *See Burger King*, 471 U.S. at 477 (recognizing that the state's interest, among other considerations, "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required").[19]

[19] This conclusion is further supported by the plaintiff's interest in obtaining relief in New Jersey being at its apex, given that there is no other convenient forum or effective relief available to the Nicastros Although McIntyre America was named as a defendant in the complaint, it went bankrupt in 2001 (J.A 91a-93a), just after Mr. Nicastro's accident and two years before this lawsuit was filed in 2003, the same year McIntyre America's bankruptcy case was closed. The likelihood of recovery from McIntyre America's liquidated assets is non-existent. Even if McIntyre America still existed, it would be liable under New Jersey law only for its own fault N.J. Stat Ann § 2A:58C-9

D. Petitioner Has Failed to Present Any Reasons Why New Jersey's Assertion of Jurisdiction in this Case Would Be Unfair and Substantially Unjust.

Consistent with this Court's precedents, upon concluding that McIntyre England was sufficiently connected to New Jersey to render an exercise of jurisdiction prima facie fair, the court below analyzed other factors, including the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief, and found that that McIntyre England failed to make the required compelling showing that those factors would render the exercise of jurisdiction offensive to traditional notions of fair play and substantial justice. (Pet. App. 40a-42a.)

McIntyre England, in its petition and merits briefing, focuses exclusively on whether the New Jersey Supreme Court correctly determined that Nicastro made a prima facie showing of minimum contacts under the stream-of-commerce theory. (*See* Pet'r's Merit Br. 30 (Petitioner's "sole concern is whether J. McIntyre had minimum contacts with New Jersey.").) It does not contest the court's finding that McIntyre England failed to present compelling reasons why the interests of fair play and substantial justice would be violated by New Jersey's exercise of jurisdiction over this case. That finding, therefore, is not before the Court. *See United States v. Int'l Business Machines Corp.*, 517 U.S. 843, 855 n.3 (1996).

CONCLUSION

The judgment below should be affirmed.

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IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

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ARGUMENT

I. THIS COURT'S JURISPRUDENCE DICTATES REVERSAL.

Under this Court's Fourteenth Amendment due process regime, New Jersey has no adjudicative jurisdiction over J. McIntyre Machinery Ltd ("J. McIntyre"), a corporation that "has no contacts, ties, or relations" with New Jersey. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The New Jersey Supreme Court, realizing that J. McIntyre had no "minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case," concluded that the only way to hale J. McIntyre into its courts was to discard as "outmoded" this Court's enduring minimum contacts test, the "constitutional touchstone" of personal jurisdiction analysis. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 108 (1987) (O'Connor, J., concurring).

Respondents try to paper over the New Jersey Supreme Court's abandonment of this Court's minimum contacts test with scattered fragments of language pulled from this Court's decisions. They fail.

A. Territoriality Is The Operative Principle Applied By This Court To Effect Fourteenth Amendment Due Process Rights.

Respondents argue wrongly, that territoriality was previously dispensed with. Resp. Br. 42-43. While "presence," "as the standard for measuring the extent

of state judicial power over . . . corporations," *McGee v. International Life Ins.*, 355 U.S. 220, 222 (1957), is now gone for specific jurisdiction, territoriality is not. Respondents incorrectly equate territoriality with federalism and argue that this Court has replaced federalism with personal liberty. Resp. Br. 42-46. This Court has identified both federalism and liberty as sources of the due process right, but both are effected by the application of territoriality. Justice O'Connor in *Asahi* "reaffirmed" the "oft-quoted reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), that minimum contacts must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities *within the forum State* . . ." *Asahi*, 480 U.S. at 109 (emphasis added) (quotation omitted).

Throughout this Court's history of determining the scope of state in personam jurisdiction, the state not the United States—has been the defining unit. *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 943 (4th Cir. 1994).

Respondents mischaracterize as "dicta" the reliance in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), on territoriality and purposeful availment. Resp. Br. 45. In *World-Wide Volkswagen*, this Court entered into a detailed discussion of the territorial principles of modern jurisdiction, citing to the reliance in *Hanson* on "interstate federalism." 444 U.S. at 293-94. "*Applying these principles* to the case at hand," this Court held that there was an absence of "affiliating circumstances" that would justify Oklahoma's exercise of jurisdiction over a foreign defendant. 444 U.S. at 295 (emphasis added).

Whatever the source of the due process right under the Fourteenth Amendment, "the requirement that there be minimum contacts between the nonresident defendant and the forum state" is not altered. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n. 10 (1982) (quoting *World Wide Volkswagen*, 444 U.S. at 291-92).

B. The Adoption Of A National Contacts Test Or A Convenient Forum Test Would Require Rejection Of This Court's Jurisprudence.

Respondents offer only that J. McIntyre had contacts with the territory of the United States. Resp. Br. 9, 17, 19, 20.

1. *National contacts*

Respondents ask this Court to radically revise the test for personal jurisdiction over a foreign manufacturer to inquire only whether the defendant marketed "directly or indirectly" to all fifty of the United States. *Id.* at 27. Respondents seek the adoption of a *national* contacts test that is both unsound and inconsistent with this Court's jurisprudence.

As outlined by Justice O'Connor in *Asahi*, 480 U.S. 113 n., a national contacts test would be for Congress to establish by vesting jurisdiction over foreign defendants in federal district courts, and judged under the Fifth Amendment. *Cf.* Fed. R. Civ. P. 4 (k)(2); *and see* Chamber of Commerce Amicus Br. 19-21. National contacts have never been adopted by this Court as a basis for jurisdiction under the Fourteenth Amendment, which

requires contacts between the defendant and the forum state. When this Court was given the opportunity to apply a national contacts test in *Asahi*, both pluralities applied, as a "constitutional touchstone," the state-centric minimum contacts test, and analyzed only Asahi's contacts with the state of California, not the Nation as a whole. *Asahi*, 480 U.S. at 112-13, 121.

2. *Convenience*

In addition to "national contacts," Respondents argue for adjudicative jurisdiction based upon "convenience" to the plaintiff, not necessity, an argument drawn from Justice Brennan's dissent from over thirty years ago in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and from his dissents, written together, to *World-Wide Volkswagen* and *Rush v. Savchuck*, 444 U.S. 320 (1980). Resp. Br. 48 n. 18, 49 n. 19; *see also* Ja196a; Plaintiffs' Appellate Division Appx. (2/20/07) at Pa229 (Tr., Motion to Dismiss, 11/03/03). Justice Brennan would have abandoned *International Shoe* and forum state contacts, and focused instead on the plaintiff. *See Shaffer*, 433 U.S. at 219; *World-Wide Volkswagen*, 444 U.S. at 299. This Court rejected Justice Brennan's views. In *Shaffer*, this Court refused to alter the focus on the putative defendant and its ties to the forum state, reaffirming its holding in *Hanson*, 357 U.S. at 254, that a state does not acquire jurisdiction "by being the 'center of gravity' of the controversy or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Shaffer*, 433 U.S. at 215.

This Court rejected the plaintiff-centric approach in both *Savchuk*, 444 U.S. at 332 (the "subtle shift in focus from the defendant to the plaintiff" is "forbidden by *International Shoe* and its progeny"), and in *World-Wide Volkswagen*, listing each of Justice Brennan's reasons for changing this Court's personal jurisdiction jurisprudence: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (citation omitted).

Respondents seek adoption of dissents that were later abandoned by Justice Brennan himself in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985). Respondents ask this Court to change the understanding of the Constitution to validate their choice of venue, even as their claim is now pending in their second choice, the United Kingdom.

II. RESPONDENTS EITHER MISUSE OR IGNORE PRECEDENT.

A. Respondents Ignore Purposeful Availment.

Respondents address "purposeful availment" largely by ignoring it. They argue around, but never specifically assert, that J. McIntyre purposefully availed itself of the privilege of conducting activities within New

Jersey. The purposeful availment claimed is of "all fifty states." Resp. Br. 9, 17.

B. Respondents Misconstrue The Facts Of *Asahi* As Law And Pull Facts Out Of Context.

Respondents misuse Justice O'Connor's *Asahi* opinion to squeeze the facts of this case into "additional contacts." *See* Resp. Br. 24-26. That opinion can fairly be divided into four parts. First, Justice O'Connor provides a comprehensive detailing of this Court's principles of adjudicative jurisdiction. *Asahi*, 480 U.S. at 108-10. Justice O'Connor then describes the split among courts on jurisdictional approaches, including the mere flow of goods into the United States as a predicate for jurisdiction. *Id.* at 110-12. Next, Justice O'Connor rejects the national contacts test and sets forth a rule of law, heavily reliant on *Burger King*, that is "consonant with the requirements of due process": "The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Id.* at 112 (emphasis in original) (internal citation omitted). Justice O'Connor states that placement of a product into the stream of commerce does not meet the rule of law, and gives examples of conduct that may. *Id.*

Finally, Justice O'Connor applies the law to the facts and concludes that respondents "have not demonstrated any action by Asahi to purposefully avail itself of the California market." *Id.* at 112. This topic sentence is followed by a five-sentence recitation of facts. "On the basis of these facts, the exertion of personal jurisdiction

over Asahi by the Superior Court of California exceeds the limits of due process." *Id.* at 113.

The test set forth in the third part of Justice O'Connor's opinion is: a substantial connection must exist between the defendant and the forum state (not between defendant and the United States) and "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Id.* at 112 (emphasis in original). The actual test is never quoted by Respondents because they cannot meet it. The test Justice O'Connor posits inhabits one paragraph, and it is dispositive. Justice O'Connor achieves clarity through the rhetoric of repetition. The paragraph has but four sentences, yet the phrase "the forum state" appears ten times. *Id.* In each of the three sentences that follow the topic sentence, one phrase is repeated, always at the end: "an action of the defendant purposefully directed toward the forum State," "an act of the defendant purposefully directed toward the forum State," "an act purposefully directed toward the forum State." *Id.*

Respondents wrongly claim that a statement of fact in the fourth part—"[Asahi] did not create, control, or employ the distribution system that brought its valves to California"—is "additional conduct" in part three. Resp. Br. 23, 24-25.

Respondents argue that because the distributor "effectively served" as Petitioner's "sales agent to New Jersey and every other state in the United States," Petitioner fell within the example of conduct of "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."

Resp. Br. 25-26. That reading guts Justice O'Connor's dispositive paragraph of meaning.

C. Respondents Attempt To Redefine *World-Wide Volkswagen's* Central Holding, Which Reaffirmed *Hanson*.

Respondents ask this Court to focus on three words in *World-Wide Volkswagen*, 444 U.S. at 297: "directly or indirectly." Resp. Br. 20, 21. The words appear in the middle of a three-sentence paragraph of the decision that begins by stating the *Hanson* test: "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* at 297-98. The paragraph ends by employing the words "with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297 (quoting *Hanson*, 357 U.S. at 253). The context renders the meaning plain: a manufacturer can be subject to jurisdiction as long as it purposefully conducts activities within the forum state either itself or, acting as a primary participant, by purposefully directing the actions of another within the forum state. *See id.* at 297-98; *see also Burger King*, 471 U.S. at 480 n. 22.

III. THE RECORD FACTS AND LAW DO NOT AID RESPONDENTS IN OBTAINING JURISDICTION.

Respondents argue that the record allows exercise of jurisdiction over J. McIntyre under this Court's jurisprudence. Resp. Br. 14-20. There is no evidence that Petitioner, or anyone at its direction, sold or marketed any products directly or indirectly into New Jersey.

A. The Only Evidence Of The Transaction At Issue Discloses No Contact By Petitioner With New Jersey.

The sale of the subject 640 shear to Mr. Nicastro's employer, Curcio Scrap Metal, was in August 1995. The totality of record facts related to that shear and that sale can be found in one invoice, JA43a, and three certifications: by Frank Curcio, JA77a-79a, and Jason Midgley and Sally Johnson of Petitioner. JA21a-25a; JA82a-87a.

Petitioner's distributor purchased the shear from Petitioner. JA22a. After his father heard of the machine from a booth exhibit at a convention in Las Vegas, Michael Curcio ordered the machine from the distributor in Ohio. JA78a. The machine was sold by the distributor to Curcio, F.O.B. Stow, Ohio, per an invoice dated August 25, 1995. JA43a.

There is no record evidence that Frank Curcio met anyone at the booth, either from Petitioner or the distributor. There is no record evidence that anyone marketed into New Jersey, either Petitioner or the distributor. There is no record evidence that anyone solicited anyone in New Jersey for the sale.

Not only is there no record evidence that Petitioner knew of the sale to the employer, there is affirmative evidence that Petitioner did not know who the distributor's customers were. The distributor refused to give up its customer list. JA85a.

Respondents agree that the transactions at issue were a sale (not a consignment) by Petitioner to the distributor and another by the distributor to Respondents' employer. Respondents stated to the New Jersey Supreme Court that "these large industrial machines [] were built on a per order basis." JA189a; *accord*, Resp. Br. 3 (stating as an unqualified fact that the machines "for sale by" the distributor were built "only after" the distributor "received firm orders for those products."); Brief in Opposition to Defendant's Motion to Dismiss, Superior Court of New Jersey (10/11/06) at 19-20. Furthermore, the distributor is known to be substantially engaged in selling the goods of J. McIntyre. *See* Ohio Rev. Code. Ann. §1303.102(20)(a)(iii) (2010).

"All [the distributor] said was, here is an order, deliver it to me in Ohio, and it was delivered in Ohio, at which point [the distributor] shipped it to New Jersey." JA189a-190a.

B. Respondents Wrongly Claim That Four 640 Machines Were Sold Into New Jersey; The Record Is That Only One Was, This One.

Respondents assert, without support, that "[a]t least four model 640 machines were sold into New Jersey." Resp. Br. 6. The report of the private investigator, upon which they rely, is unsworn and based upon hearsay. JA140a-44a. Besides the model 640 shear purchased by Curcio, the only other J. McIntyre machine the investigator alleges he was able to verify existed in New Jersey was owned by Cinelli Scrap Metal. The record does not disclose that that machine was "sold into New Jersey."

What is presented in the record before this Court is a single act directed toward New Jersey and only by the distributor: shipping a shear to fulfill an order made to the distributor. Petitioner did nothing to direct the sale and had no knowledge that the machine was sent to New Jersey. *See Burger King*, 471 U.S. at 480 n. 22 (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

C. The Distributor's Single Sale Of One Product Into New Jersey Cannot Establish New Jersey's Jurisdiction Over J. McIntyre.

This is a single act case, and a single act may not be enough to create jurisdiction. *See Burger King*, 471 U.S. at 476 n. 18. The record is devoid of evidence that the distributor ever sold another J. McIntyre machine into New Jersey or marketed to New Jersey in any fashion. Even as to the sole machine sold into New Jersey, there is no record evidence of pre-sale negotiations or post-sale service. The distributor's "affiliation with the forum" could not be more "attenuated." *Id.* The absence in the record of prior negotiations and contemplated future consequences renders personal jurisdiction over even the distributor a substantial issue. *Id.* at 478-79.

"In short," to employ the language of *World-Wide Volkswagen*, 444 U.S. at 295, "respondents seek to base jurisdiction on one isolated occurrence": a single sale by an independent distributor made by it to New Jersey. If the record does not establish jurisdiction over the distributor, it certainly cannot over Petitioner.

D. Respondents Do Not Challenge The Finding That Petitioner And Its Distributor Were Distinct And Independent In Operation And Control.

"J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled without any common ownership." So found the New Jersey Supreme Court. Pet. App. 7a. Respondents ignore that finding.

Petitioner's contacts with New Jersey "must be assessed individually." *Calder*, 465 U.S. at 790; *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). The only record activity directed at New Jersey was the fulfillment of an order, an activity that Petitioner did not direct (much less purposefully, *see Burger King*, 471 U.S. at 480 n. 22), and whose destination Petitioner did not know. JA85a. There is no record evidence that the distributor directed any marketing at the forum state. But there is record evidence, from an undated letter, that the distributor alone paid at least $350,000 in advertising and other costs, and that the distributor handled machinery repairs and warranty issues without monetary assistance from Petitioner. JA126a.

E. New Jersey Substantive Law Allows Suit Against A Distributor.

The law professor amici, brief at 3, wrongly assert that reversal would immunize manufacturers from jurisdiction in any state. Where a United States distributor sells a product made by a foreign

manufacturer, the distributor can be held to account in this country for a product liability claim, and by indemnification, so can the manufacturer. *See* PLAC Amicus Brief at 23-24. Foreign manufacturers routinely use far more sophisticated operations than a "scheme" of one distributor and periodic attendance at trade shows in the United States, with no demonstration of harm to Americans' interest in seeking recourse. The system works.

Respondents do not argue that the bankruptcy of the distributor in this case should change the law or affect the result of this case. It should not. It belies common sense to believe that foreign manufacturers choose distributors that will not pay their bills.

Respondents named the distributor in their New Jersey suit, claiming that it is "strictly liable in tort" to Respondents. JA6a-9a. Under New Jersey law, a distributor can be held strictly liable to Respondents for injuries caused by defective products.

The distributor is a product "seller" for purposes of New Jersey's product liability law and, where the product manufacturer is not available, the product seller remains liable. N.J. Stat. Ann. §2A:58C-8, 9 (2010); *Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 511, 562 A.2d 202, 205 (1989).

IV. NOTICE OF ADJUDICATIVE JURISDICTION IS CREATED WHEN AN ECONOMIC ACTOR TAKES A CONCRETE ACT DIRECTED AT THE RESIDENTS OF THE FORUM STATE.

Beginning with their restatement of the Question Presented, Respondents argue for a forseeability test that is purely causal: delivery of products into a national market "with the foreseeable consequence" of purchase in any state, including New Jersey. Resp. Br. 14, 17, 20.

Causation is not enough. "Of course, the mere forseeability of an event in another state is 'not a sufficient benchmark for exercising personal jurisdiction.'" *Lebel v. Everglades Marina, Inc.*, 115 N. J. 317, 324, 558 A.2d 1252, 1255 (1989) (quoting *Burger King*, 471 U.S. at 474). In *Burger King*, this Court stated that in defining "reasonably anticipate" it "frequently has drawn from the reasoning of *Hanson*," that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 471 U.S. at 474-75.

"Clear notice" is just another term for "reasonably anticipate," and it, too, arises from purposeful availment. *World-Wide Volkswagen*, 444 U.S. at 297. Respondents spend six pages claiming that fair warning arises from cases from courts other than this Court, which have adopted a "should have known" test, and the fact that Petitioner had been sued in states other than New Jersey. Resp. Br. 30-35; *and see Whitaker v. J. McIntyre Machinery, Ltd*, No. 2003-CA-001429-MR, 2004 WL 1586989 (Ky. App. Ct. July 16, 2004) (J.

McIntyre dismissed because the statute of limitations expired). A Nottingham, England company is not, and should not be, required to have a constitutional lawyer on retainer to evaluate the plethora of lower court personal jurisdiction cases as they arise.

Nor is personal jurisdiction jurisprudence decided by "consensus," whatever that means. Resp. Br. 35. It is decided by this Court. As the New Jersey Supreme Court recognized: "It seems that little profit can be gained from an extended analysis of Supreme Court doctrine until the Court itself draws the lines as the umpire of federalism." *Lebel*, 115 N.J. at 319, 558 A.2d at 1253.

Alas, Respondents do not find a place in their narrative of "consensus" for *Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988), where this Court reaffirmed state minimum contacts, or Justice Stevens's statement that "the due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners." *American Dredging Co. v. Miller*, 510 U.S. 443, 462 (1994) (Stevens, J., concurring).

V. THIS COURT'S FOURTEENTH AMENDMENT PERSONAL JURISDICTION JURISPRUDENCE SHOULD BE PRESERVED.

For Respondents to prevail, this Court would have to re-write personal jurisdiction law. Nothing advanced by Respondents, their amici, or the court below, justifies that step.

A. No Justification Exists To Abandon This Court's Long-Settled Jurisprudence.

Respondents and amici cite no examples of failure of this Court's Fourteenth Amendment jurisprudence. Amicus American Association of Justice ("AAJ"), the renamed American Trial Lawyers Association, devotes a section of its brief to the influx into this country of products, but does not identify a single case where legal recourse was absent. If the issue is whether jurisdictional doctrine should be deracinated from the fixture of our Constitution, there ought to be some evidence that it is deeply flawed in practice. None is offered. Even in this case, Respondents do not allege (and did not below) that they lack recourse to American justice; they just want New Jersey justice.

Nevertheless, there exist separate, sound reasons that this Court should decline to follow the course urged by Respondents.

1. *The nature of our federal system is reason enough not to abandon this Court's jurisprudence.*

It is not an act of mere conceptualism to recognize, as this Court has in *Hanson* and its progeny, that the very nature of our federal system constrains the exercise of state adjudicatory jurisdiction. *See* John S. Baker, Jr. & Augustín Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 Inter-American Law Review 101, 125 (forthcoming 2011). Adjudication of cases against foreign defendants poses a special risk in state courts which are prone to

give sway to local interests. *See The Federalist* No. 3, at 10 (John Jay) (Liberty Fund ed., 2001).

2. *The United States, not New Jersey, has responsibility for international commerce and its ramifications.*

In a bolder embrace of the central theme of the New Jersey Supreme Court than Respondents can muster, AAJ asserts that because "we live in a truly global economy," the law should "evolve," meaning that this Court should change its views of due process rights so that state courts have more power. AAJ Br. 6. This is wrong on many fronts: it uses catch-phrases in place of analysis, and ignores the locus of responsibility for responding to a "global" economy, the United States Government.

a. *"Globalization" is an unexamined premise.*

Every generation, it seems, claims to be living in a radically changing world. Change is always with us, but perhaps the most dramatic change in the last several years has been the increase in unexamined assertions of encroaching globalization. America has faced new eras of globalization almost as many times as America has lost its innocence. Such frequent claims need to be examined critically, including the "simplistic misreadings of complex historical, social, and economic realities . . ." Vaclav Smil, *Prime Movers of Globalization: The History and Impact of Diesel Engines and Gas Turbines* 1 (The MIT Press 2010).

Not only do Respondents' amici and the lower court not understand "globalization," they have the timing wrong. The impulse of humans to explore new worlds is not new to our era, nor is the corporate modality through which we organize our explorations. *See, e.g.*, Peter C. Newman, *Empire of the Bay: The Company of Adventurers That Seized A Continent* (Penguin 2000). The two prime movers of the modern global economy are the internal-combustion engine, commercialized in the 1890s, and the gas turbine, successfully designed in the 1930s. Smil, *supra*, at 17. By the early 1950s "the design and production of diesel engines were mature enterprises." *Id.* at 110. The best-selling jetliner in history, the Boeing 737, first flew in 1968. *Id.* at 100.

b. *Foreign trade is a matter within the exclusive constitutional competence of the United States Government.*

Goods and people can travel overseas, but whether and how to allow them into the United States is the exclusive province of the national sovereign. *See American Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 417 (2003).

For over sixty years, Congress and successive Presidents adopted measures to advance the interests of this country and its citizens through a liberalized trade policy. The United States entered the General Agreement on Tariffs and Trade ("GATT") in 1948, participated in GATT rounds in 1947, 1949, 1951, 1956, 1960-1961, 1964-1967, 1973-1979, and 1986-1994, and enacted the 1962 Trade Expansion Act, establishing

trade adjustment assistance ("TAA"). *See* Todd Tucker & Lori Wallach, *The Rise and Fall of Fast Track Trade Authority* 27-101 (Public Citizen's Global Trade Watch 2009), *available at* http://www.fasttrackhistory.org/TheRiseAndFallOfFastTrack.pdf. Congress passed the Trade Reform Act of 1974, expanding executive authority to negotiate non-tariff trade issues such as government procurement regulations, customs procedures, domestic health and sanitation laws, meat-safety and inspection regulations, and "Buy American" rules, and enabling the adoption of trade remedies. *See id.* at 1-6, 53-78. The North American Free Trade Agreement took effect on January 1, 1994 and the United States entered the WTO on January 1, 1995. *Id.* at 85-93. Congress approved the Central American Free Trade Agreement in 2005. *See* J.F. Hornbeck, Congressional Research Service, *CRS Report for Congress: The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)* 1-3 (Jan. 16, 2008), *available at* http://www.nationalaglawcenter.org/assets/crs/RL31870.pdf.

Congress provides varied remedies for industries and workers. William H. Cooper, Congressional Research Service, *CRS Report for Congress: Trade Remedy Law Reform in the 108th Congress* 2 (July 22, 2003), *available at* http://fpc.state.gov/documents/organization/23369.pdf; Jeffrey Salzman, Social Policy Research Associates, *Rapid Response and TAA* 2 (2009), *available at* http://wdr.doleta.gov/research/FullText_Documents/Rapid%20Response%20and%20TAA%20-%20Final%20Report.pdf. TAAs were expanded in the Trade Reform Act of 1974, the Omnibus Trade and Competitiveness Act of 1988, the

Trade Act of 2002, and the Trade and Globalization Adjustment Assistance Act of 2009. *Id.* at 2-4. The International Trade Commission has the power "to issue an exclusion order and/or a cease-and-desist order against imports that it has determined are sold in the United States through unlawful methods of competition or sale or the products of intellectual property rights infringements." *Id.* at 2 n.1.

Foreign trade and its impact on our people are for the United States Government alone to determine.

c. *This Court should not change the law to accommodate protectionism.*

Amicus AAJ makes explicit what animates the desire to dismantle constitutional protections for foreign defendants: the claim that millions of products are brought into the United States, and they bring danger with them. AAJ Br. 9. First, the dangerous instrumentality concept is irrelevant to jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 296 n. 11. Second, Congress can and has responded to potential import danger, most recently, by enacting the FDA Food Safety Modernization Act. *See* S.510, 111th Congress, Title III, Improving the Safety of Imported Food.

If Americans require special protection from the flow of products into this country that Congress and the Executive have deemed to be in the national interest, then Congress and the Executive are the constitutionally competent authorities to act. States are not entitled to their own foreign policy.

B. This Court's Fourteenth Amendment Jurisprudence Advances The Interests of Justice.

Even if this Court were to start afresh to fashion a jurisprudence of personal jurisdiction, it ought to end up right where *Burger King* and Justice O'Connor in *Asahi* led us: a putative defendant can be brought before a state court only if that person exhibits a form of consent by deliberately taking a concrete act purposefully directed toward the residents of another state and a substantial connection has been created thereby. At that point, it is fair and just to hold that person to account in a suit arising out of the defendant's activity directed at the state.

That rule appropriately protects economic actors, especially foreign defendants, in facing a civil justice system that includes fifty state court systems of enormous diversity. New York has its Civil Practice Law and Rules, a liberal interlocutory appeal rule, and no codified rules of evidence. Pennsylvania allows a plaintiff to commence an action without a complaint. Delaware and New Jersey preserve the division between law and equity. Some states have business courts, others not. New Hampshire allows advisory opinions. Funding of courts and the salaries paid to judges are a matter for the states. So, too, are judicial elections, both into office and out. *See, e.g.*, James Sample, et. al., *The New Politics of Judicial Elections 2000-2009* (Brennan Center for Justice, August, 2010). The diversity is engrained in our federal system and only rarely has this Court stepped in. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.*, U.S. , 129 S.Ct. 2252 (2009); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980); *cf. Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

Justice O'Connor understood that a more permissive jurisdictional regime for foreign defendants required a judicial system without the differences that pervade the state court systems. *Asahi*, 480 U.S. at 113 n. That is why any national contacts jurisprudence depends upon the employment of federal courts, where procedural and structural uniformity is the rule.

The consequences of having diverse state civil justice systems support this Court's insistence on special care in the exercise of jurisdiction over foreign defendants. *Id.* at 115; *American Dredging*, 510 U.S. at 462 (Stevens, J., concurring). However confusing state differences may be for a domestic economic actor, they will be that much more for a foreign corporation. That is also why this Court ought not to adopt the purposeful non-availment test of the New Jersey Supreme Court, even apart from the fact that it is directly contrary to this Court's jurisprudence. The amici States blame Petitioner for not doing research into New Jersey law before selling into the United States. States Br. 29. Purposeful non-availment would, thus, obligate foreign companies to engage in 50-state surveys, regularly updated. The constitutional rights of foreign defendants cannot be so conditioned. *Cf. Bendix Autolite*, 486 U.S. at 893.

The New Jersey Supreme Court's disregard of this Court's direction in *Asahi* and *American Dredging* to take special care, and the hostility to foreign defendants expressed by amici, particularly the States, States Br. 29, are deeply troubling. To ensure that special care is taken, *cf. American Dredging*, 510 U.S. at 469 (Kennedy, J., dissenting), this Court should consider placing protections in the rule of law itself.

VI. THIS COURT SHOULD ADOPT A RULE CONSISTENT WITH *BURGER KING* AND JUSTICE O'CONNOR'S OPINION IN *ASAHI*.

The amici States want no rules at all, just "a flexible approach . . . that allows courts to establish intent to serve the forum State market through consideration of the complete universe of relevant evidence." States Br. 21. But, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, U.S. , 130 S.Ct. 1181, 1193 (2010). Such straightforward rules "also promote greater predictability," which "is valuable to corporations making business and investment decisions." *Id.* That "there will be hard cases," is no reason not to establish such a test. *Id.* at 1194.

A clear, rule-oriented test for specific jurisdiction is especially important for foreign corporations who must fashion their actions from a distance. *See* Linda J. Silberman, *Reflections on* Burnham v. Superior Court, 22 Rutgers L.J. 569, 576 (1991). Minimum contacts, as elaborated by this Court in *Burger King* and by Justice O'Connor in *Asahi*, meets those standards and the "test" of "reasonableness" does not. As a "free-form 'fairness' inquiry," a "tilt toward 'reasonableness' in all jurisdictional inquiries has been a litigation luxury" that we can no longer afford. *Id.* at 581, 583; *see also* Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 164 (Harvard Univ. Press 1918). As it is, the lack of clarity coming out of *Asahi* has created "a great deal of uncertainty as to the extent [manufacturers and sellers of products] are subject to the jurisdiction of various states." Baker & Parise, *supra*, at 120-21.

Nor need there be different tests for "stream-of-commerce" and "non-stream-of-commerce," or for contracts and torts. *International Shoe* and *Hanson* are as much a part of *World-Wide Volkswagen* as they are of *Burger King* and of Justice O'Connor's views in *Asahi*. A putative defendant, itself, must deliberately and with purpose direct its activities at the residents of the forum state. Those activities must be significant and they must create a substantial connection with the forum state.

Respondents seek to ameliorate the negative impact of their position upon our relations with other countries and their civil justice systems by citing to treaties to which the United States is not a signatory and whose jurisdictional provisions apply only to domicilliaries of signatory countries. Resp. Br. 39-40. Respondents quote a restatement provision that merely describes specific jurisdiction. *Id.* at 40-41. Respondents do not deal with the inevitable reaction of other countries to a state court exercising power it lacks to discard constitutional protections for foreign companies in order to protect its citizens from the decision by the United States to participate in foreign trade, to say nothing of its comments about outsourcing and the state of justice in the United Kingdom. And Respondents ignore the example of the roiling of U.S.-Canada relations by exercise of personal jurisdiction. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 49-50 (2006).

The problem is compounded by the language utilized by the amici States, analogizing Petitioner's position to that of a criminal defendant who has committed mass murder by bombing a building. States Br. 29. Such language only confirms that "the U.S. approach to private international law [is] dominated by the parochial viewpoint of the states." Baker & Parise, *supra*, at 125.

Recognition of foreign judgments by other countries is a complex, delicate matter. The tone in both the New Jersey Supreme Court's opinion and that of the amici States provides ample justification for foreign countries to conclude that state court exercise of jurisdiction over a foreign defendant (except by consent) is presumptively unfair. Already it is the case that most judgments from courts in the United States are not recognized in the Nordic countries and in Austria. Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173, 227 (2008). And European countries can now, with reason, treat state long-arm jurisdiction as a "power play" by the state rendering courts. *Id.* at 228.

If state forays into foreign policy through exercising adjudicatory jurisdiction create mischief, the solution is not to grant them the authority that rightly belongs only to the United States. *See* Baker at 122. Alexander Hamilton wrote: "[T]he peace of the WHOLE ought not to be left to the disposal of a PART." *The Federalist* No. 80, at 412-13 (Liberty Fund ed., 2001). If there is a need for jurisdiction over foreign defendants that goes beyond that which is permitted under the Fourteenth Amendment, a need which has not been established before this Court, it is for Congress and the Executive

to vest in the federal judiciary "cognizance of all causes in which the citizens of other countries are concerned." *Id.*

CONCLUSION

The true face of American justice is not that presented by Respondents, their amici and the lower court; it is the figure that fronts the building in which this Court sits. Reversal is in the best interests of Petitioner, the Constitution, and our ability to claim comity among the community of nations.

Respectfully submitted,

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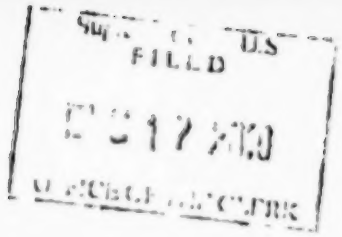

In The

Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondents, Robert Nicastro *et ux.* This brief is filed with the consent of all parties.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions, including product liability cases. Plaintiffs represented by AAJ have a direct interest in holding accountable all entities that contributed to their injuries.

♦

SUMMARY OF ARGUMENT

This Court has recognized that evolving economic realities require an evolving jurisdictional analysis. Since the Court last engaged in an analysis of specific jurisdiction, the world's economy has become truly global, with the United States continuing to occupy center stage as a primary target market for the world's goods. Corporations, which did not fit comfortably into a traditional jurisdictional analysis

[1] Letters of consent from the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members or its counsel make a monetary contribution to its preparation or submission.

before this transformation, now fit even less comfortably into traditional analysis in today's "flat" world.

Although this Court will eventually need to revise its analysis of specific jurisdiction in light of the realities of the modern world, it need not do so in this case, whose facts support a finding of jurisdiction in New Jersey under both the "stream of commerce" test set forth by Justice Brennan in his concurring opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 116 (1987), and the "stream of commerce – plus" test set forth by Justice O'Connor in the plurality opinion. *Id.* at 108.

If the Court does decide to address the broader question in the context of this case, however, it should conform jurisdictional analysis to today's economic realities in a test that remains true to Constitutional principles while being flexible enough to accommodate the myriad business transactions of the modern world. The Court should reaffirm the stream of commerce test for personal jurisdiction set forth in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), but should clarify that it is subject to the reasonable expectation of the manufacturer/distributor. Under this test, a manufacturer of a product is subject to personal jurisdiction in a State if it places the product in the stream of commerce with the reasonable expectation that the product will be marketed or sold in that State. If the manufacturer reasonably expects that the product will be marketed and sold nationwide, the manufacturer is presumed

to have intended to avail itself of the market in each State.

The test recognizes the reality of globalization, which has resulted in trillions of dollars of imports to this country. The test violates neither State territoriality nor State sovereignty. It relies on the foreseeability that is critical to Due Process. It requires an act by the defendant itself, not a third party. It applies equally to foreign and United States manufacturers. It satisfies the defense of ignorance of the forum. It interferes with neither foreign trade nor foreign relations.

Petitioner and its *amici* embrace the "stream of commerce – plus" test of Justice O'Connor in *Asahi*. They start with the fiction that purposefully directing products to all the United States does not include purposefully directing them to each State. On this fiction they construct a roadmap to immunity that could be called "don't ask, don't tell." A foreign manufacturer should employ a separate corporation to distribute its products in this country. The foreign manufacturer should neither ask the distributor where it intends to sell the products, nor should it tell the distributor where to sell them. Interpreting stream of commerce – plus strictly, the foreign manufacturer escapes all jurisdiction in this country at the same time that it reaps profits from this country. This can be done because a number of the factors considered in that test are no longer commercially meaningful for imports. The "remedy" provided to the injured plaintiff is to travel to the foreign manufacturer's

home country to sue, which, in the case of over forty percent of imports, is China.

♦

ARGUMENT

I. THE ECONOMIC REALITIES OF TODAY'S WORLD REQUIRE AN EVOLVING JURISDICTIONAL ANALYSIS.

A. This Court Has Signaled Its Recognition of the Need for Jurisdictional Analysis to Evolve as Business Becomes More International in Scope.

This Court has repeatedly recognized that jurisdictional analysis has evolved and should evolve as business becomes more complex and national in scope. This same recognition applies even more strongly now that business has become international in scope.

Over half a century ago, this Court stated that "[i]n a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957). The Court acknowledged that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *Id.* This trend is due in part to the "increasing nationalization of commerce. . . ." *Id.* at 223.

Twenty-three years later, the Court affirmed that the evolution it recognized in *McGee* was still very much at work:

> The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee v. International Life Ins. Co., supra,* at 222-223, this trend is largely attributable to a fundamental transformation in the American economy:
>
> "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."
>
> The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980).

McGee and *World-Wide Volkswagen* signal this Court's recognition that changes in commerce require changes in jurisdictional analysis.

B. We Live in a Truly Global Economy.

Petitioners' *amici* claim that foreign investment will dry up if Petitioner is held to account in a New Jersey state court. Petitioner's *amicis'* own sources refute the idea that finding jurisdiction in this case or any other will alter the desire of foreign manufacturers to do business here. The reason for this is that we live in a truly global economy where the United States is without question the world's largest consumer nation.

The Brief of the Organization for International Investment and Association of International Automobile Manufacturers Inc. as *Amici Curiae* in Support of Petitioner ("Organization for International Investment Brief") cites a number of non-legal sources to support its argument that United States legal uncertainty damages efforts to attract foreign direct investment. *See* Organization for International Investment Brief, pp. 9-12. Not one of these non-legal sources cites the stream of commerce test for personal jurisdiction, or even the more general question of the proper test for personal jurisdiction, as a concern of international investors about the predictability of the United States legal system. *See, e.g.,* Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* (Aug. 2007), *available at* http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/LAI/STU.html ("Litan"), pp. 12-17 (listing the most worrisome aspects of the United States legal system); Charles G. Schott, U.S. Dep't of

Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* (Oct. 2008), *available at* http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf ("Schott"), pp. 5-8 (listing international investors' concerns with the United States legal environment).

One of these sources states that the United States economy "remains a prime destination for foreign direct investment," and predicts that "foreign investment likely will increase. . . ." James K. Jackson, Congressional Research Serv., *Foreign Direct Investment in the United States: An Economic Analysis* (July 28, 2010), *available at* http://www.fas.org/sgp/crs/misc/RS21857.pdf ("Jackson"), p. 6. The U.S. Chamber Institute for Legal Reform, which is part of the U.S. Chamber of Commerce, has questioned the "sky is falling" scenario that legal uncertainty deeply depresses foreign direct investment:

> Those companies having global ambitions and the financial strength to realize them are unlikely to avoid this country even if they believe our legal system to have drawbacks. The size and wealth of the American economy give it an enormous advantage relative to other countries and make us a "must" destination for investment by foreign parties with global ambitions. . . . For such countries [the United States and China], most foreign investors will tend to be forgiving of any warts because the profits from investing here

> are likely to more than cover the costs associated with the problems.

Litan, p. 23-24. *See also* Schott, pp. 10-11.

The stream of commerce – reasonable expectations test acknowledges the evolution of commerce often referred to as globalization. Globalization is the exponentially accelerating volume and speed of international exchange of information, goods and capital, bringing nations, markets, manufacturers, sellers and consumers closer together.

The U.S. Consumer Product Safety Commission Staff has referred to "an increasingly global economy." U.S. Consumer Product Safety Commission, Import Safety Strategy (July 2008), *available at* http://www.cpsc.gov/businfo/importsafety.pdf ("Import Safety Strategy"), p. 1. It has also referred to "the new global marketplace." *Id.* at 5. Michael O. Leavitt, then Secretary, Health and Human Services and Chair, Interagency Working Group on Import Safety, wrote President George W. Bush in July 2008 that "[l]ast year, the United States imported more than $2 trillion worth of products. These products were brought into the United States by roughly 825,000 importers through over 300 ports of entry. All projections indicate that this volume will continue to skyrocket over the coming years as the scale and complexity of international trade multiplies." Import Safety – Action Plan Update, A progress summary, A Report to the President, Interagency Working Group on Import Safety (July 2008), *available at* http://archive.hhs.

gov/importsafety/report/actionupdate/actionplanupdate.pdf ("Import Safety – Action Plan Update"), second page. The United Nations has referred to "the growing internationalization of production." United Nations Conference on Trade & Dev., *World Investment Report 2010* (June 2010), p. xvii.

Millions of units of toys, exercise equipment, pharmaceuticals, tires, cars, medical equipment, strollers, electronic equipment and other products manufactured abroad are brought into the United States and distributed through vast sales networks. Other larger ticket items such as industrial equipment are often sold through distributors or trade shows in the United States.

Petitioner's *amici* do not dispute globalization. *See, e.g.*, Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioner ("Product Liability Advisory Council Brief"), p. 31 ("the world is now 'flat' ") (citation omitted).

Globalization brings danger with it. "A wide range of products that could potentially threaten the health and safety of U.S. consumers are imported every day." Action Plan for Import Safety, A roadmap for continual improvement, A Report to the President, Interagency Working Group on Import Safety (Nov. 2007), *available at* http://archive.hhs.gov/importsafety/report/actionplan.pdf ("Action Plan"), p. 45. Imports are disproportionately recalled: "while imports currently account for about 44 percent of all consumer products sold in the United States today, they

comprise over three-fourths of all product recalls administered by the [Consumer Product Safety Commission]." Import Safety Strategy, p. 1. The ever increasing volume of potentially dangerous imported goods makes it vitally important to adopt a test for personal jurisdiction that recognizes the reality of globalization so that the tort system can fulfill its key role in enforcing expectations for product safety when products are manufactured abroad and imported to this country.

This Court has not yet addressed globalization in so many words, but as shown above, It has recognized the effect of changes in transportation and communication on State jurisdiction over nonresident corporations. As this Court said just twenty years ago,

> In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations.

Burnham v. Superior Court of California, 495 U.S. 604, 617 (1990) (Scalia, J.) (citation omitted).

The rapid expansion of the sale of foreign goods into the United States market should be met with a further evolution of the justice system to comport with the reality of modern commerce, and with a further inevitable relaxation of the strict limits on State jurisdiction.

II. IF THIS COURT DECIDES TO ESTABLISH THE CORRECT STREAM OF COMMERCE TEST, IT SHOULD REAFFIRM *WORLD-WIDE VOLKSWAGEN* BY ADOPTING A "STREAM OF COMMERCE – REASONABLE EXPECTATIONS" TEST.

This Court established a stream of commerce test for personal jurisdiction over corporations in *World-Wide Volkswagen, supra,* 444 U.S. at 297-98. Seventeen years later this Court split three ways over the correct interpretation and application of that test in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987). Relevantly, a total of four Justices joined in Justice Brennan's stream of commerce test. *Id.* at 116. Four joined in Justice O'Connor's "stream of commerce – plus" test. *Id.* at 108.

The Court may use the instant appeal as a vehicle to address the stream of commerce test again. If it does so, the Court should remember that corporations "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" *Burnham, supra,* 495 U.S. at 610 n.1 (Scalia, J.) (citation omitted). *Burnham* was decided in 1990, before the great expansion of the internet. *Burnham's* observation is all the more relevant today. Historical concepts such as territoriality have been rendered less relevant by globalization, particularly where corporations are involved.

A. The Court Need Not Choose the Correct Stream of Commerce Test in this Appeal.

The Court need not choose the stream of commerce test or the stream of commerce – plus test in this appeal. As has been argued at greater length in Brief for Respondents, the facts of this appeal satisfy both tests.

Among those facts are that J. McIntyre Machinery, Ltd. ("McIntyre England") expressly sought to sell its products "in the States. . . ." (J.A. 134a). It regularly marketed its products at trade shows, conventions and conferences throughout the United States over a fifteen year period, including trips to these events by its president. (J.A. 114a-117a). McIntyre England engaged a single, exclusive distributor to market its products throughout the United States. (App. 76a; J.A. 43a, 52a-53a). There is no suggestion that either McIntyre England or its United States distributor sought to limit sales to any region or State.

The facts of this case satisfy Justice O'Connor's stream of commerce – plus test. McIntyre England created and employed the system of distribution. *See Asahi, supra,* 480 U.S. at 112. The sale of the machine at issue here was "not simply an isolated occurrence, but [arose] from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States."

Id., 480 U.S. at 110 (quoting *World-Wide Volkswagen, supra,* 444 U.S. at 297).

The facts also satisfy Justice Brennan's stream of commerce test. *See Asahi, supra,* 480 U.S. at 117 ("As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise").

B. The "Stream of Commerce – Reasonable Expectations" Test is the Correct Test for Personal Jurisdiction Over Corporations.

If the Court decides to establish the correct stream of commerce test, this Court should adopt a "stream of commerce – reasonable expectations" test: a manufacturer of a product is subject to personal jurisdiction in a State if it places the product in the stream of commerce, reasonably expecting that the product will be sold anywhere in the United States, and the product causes injury in the State in which it is sold. If the manufacturer places the product in the stream of commerce in the United States without territorial restriction on the sale of the product, then the manufacturer is presumed to have reasonably expected that the product would be sold in any of the fifty States, and so the manufacturer is subject to personal jurisdiction in any State where the product causes injury.

The stream of commerce – reasonable expectations test satisfies the *Due Process Clause of the Fourteenth Amendment*. The test is a reaffirmation and clarification of the stream of commerce test set forth in *World-Wide Volkswagen* that adds the word "reasonable":

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," [citation omitted], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, supra, 444 U.S. at 297-98 (citation omitted).

The adjective "reasonable" is a clearly implied limit on the above definition of the stream of commerce test, as shown by its use elsewhere in *World-Wide Volkswagen*. *E.g.*, *id.* at 297 ("it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there") (citation omitted). A reasonable expectation that a product will be purchased in the forum State is the same as saying that the forum State is part of the reasonable market for the product.

The stream of commerce – reasonable expectations test is a clarification of Justice Brennan's stream of commerce test in *Asahi*, where the reference to unpredictable currents and eddies is another way of saying that the stream must be reasonable:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.

Asahi, supra, 480 U.S. at 117.

Under this test, jurisdiction is dependent on the reasonable market. If that market is fifty States, then jurisdiction can occur in any of the fifty States where the product comes to rest and causes injury. This is simply common sense. All must include each. This may be seen as a presumption: if the manufacturer places its product into the stream of commerce in the United Sates without restriction on where it can be sold, then the manufacturer should reasonably expect

that the product will be sold anywhere in the United States, and the manufacturer should be presumed to have intended to avail itself of the market in each State.

One of Petitioner's *amici* recognized that selling a product to a distributor for the entire United States meant that the product would be resold in a particular State: "Petitioner's sole act was selling a machine to a company in Ohio with the knowledge that it would, if resold, ultimately come to rest *somewhere* in the United States." Product Liability Advisory Council Brief, p. 22 (emphasis in original). It could more reasonably be stated that Petitioner, not having restricted the sales territory of its United States distributor, knew that since Ohio was only one of fifty States, there was a substantial certainty that the machine would be resold to a State outside of Ohio.

The same *amicus* approved a case finding jurisdiction in a State in a discrete, multi-State trade area served by a regional distributor. *See Id.* at 17. There should be no constitutional difference between use of a distributor for a group of some States and use of a distributor for a group of all States.

The stream of commerce – reasonable expectations test satisfies all traditional constitutional concerns. It satisfies the requirement of minimum contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). Under this test, the defendant

manufactured the product and chose to place it in the stream of commerce in the United States without territorial restriction. Thus it should be held to have reasonably expected that it would be sold in the forum State. The product caused injury in the forum State, giving that State a "significant interest in redressing injuries that actually occur within the State." *Keeton v. Hustler Magazine,* 465 U.S. 770, 776 (1984). Finally, the litigation filed in the forum State arises out of the confluence of the presence of the product that was reasonably expected to be sold in that State, and the injury caused in that State by the product. Minimum contacts are satisfied.

Petitioner's *amici* note that the lower court here separated the stream of commerce test from minimum contacts. *See, e.g.,* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner ("Chamber of Commerce Brief"), p. 6. It has been argued persuasively that stream of commerce is not part of the minimum contacts doctrine. *See* Diane S. Kaplan, *Paddling up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine,* 55 Baylor L. Rev. 503 (2003). Whether this Court decides that stream of commerce is or is not part of minimum contacts, there is no question that stream of commerce is a constitutional test for personal jurisdiction over corporations. *See, e.g., World-Wide Volkswagen, supra,* 444 U.S. at 297-98.

Traditional notions of fair play and substantial justice, *Helicopteros, supra,* 466 U.S. at 414, are not

offended by the stream of commerce – reasonable expectations test.

Foreign manufacturers have claimed they have difficulty in defending themselves in the United States. That has certainly not been the case here, where the Petitioner appeared at dozens of trade conventions throughout the United States from 1990 to 2005, and where it has litigated this case tenaciously for over seven years. More generally, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *World-Wide Volkswagen, supra,* 444 U.S. at 293 (quoting *McGee, supra,* 355 U.S. at 223). Defendants are readily able to obtain insurance for their products or retain counsel to represent them in the States where their products are sold and cause harm. To the extent that a foreign manufacturer wishes to profit from sales in the United States, the largest market in the world, it is hardly unfair to require that defendant to be accountable where it is making money.

The forum State clearly has an interest in redressing injuries that occur to its citizens in its State. *See Keeton, supra,* 465 U.S. at 776. Plaintiffs have an equally clear interest in obtaining relief for their injuries in their home States, where their injuries occurred, where their medical treatment likely occurred, and where liability witnesses likely live. The interstate judicial system's interest in the most efficient resolution of controversies is satisfied when

all potentially liable parties in the chain of distribution appear in one tribunal.

This is also fair to all defendants, who benefit when all potentially liable parties are in one tribunal. *See Newmark v. Gimbel's Inc.*, 54 N.J. 585, 601, 258 A.2d 697, 704 (1969) ("If the plaintiff sues the dealer alone, the dealer in his own interest should implead the manufacturer and thus avoid circuity of action"); *see also Patterson v. Home Depot, USA, Inc.*, 684 F. Supp. 2d 1170, 1174 (D. Ariz. 2010) (both plaintiff and defendant Home Depot, USA, Inc., opposed the motion to dismiss for lack of personal jurisdiction filed by a German defendant). Since manufacturers tend to be larger than distributors and many ultimate retail outlets, holding all potentially liable parties in the case benefits substantially small businesses, who are "a core component of the Chamber's [of Commerce] membership." Chamber of Commerce Brief, p. 25. This is an unusual case where plaintiffs and many domestic defendants would be equally served by leveling the playing field by permitting personal jurisdiction over foreign manufacturers of defective products.

The shared interest of the States in furthering substantive social policies is shown in this case and all others where a product causes injury by finding jurisdiction over manufacturers of products that fail to adhere to safety standards and the injured party is seeking redress. *Cf. Asahi, supra,* 480 U.S. at 114-15 (O'Connor, J.) ("[t]he dispute between Cheng Shin

and Asahi is primarily about indemnification rather than safety standards").

The stream of commerce – reasonable expectations test satisfies objections of Petitioner and its *amici*. One is the essential requirement that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Selling a product to another entity with the reasonable expectation that it will be resold in any of the States of the United States is just as much a purposeful act as shipping the product directly to customers in any of the States.

Another objection is that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen, supra*, 444 U.S. at 297 (citations omitted). If a product causes injury, its manufacturer should anticipate being haled into court. If the place of injury is among the States where the manufacturer reasonably expected that the product would be sold, then the manufacturer should reasonably anticipate being haled into court in that State.

Another objection by Petitioner's *amici* is lack of predictability. Predictability is satisfied by the stream of commerce – reasonable expectations test. A manufacturer can predict that it will be liable to suit only

in those jurisdictions where it reasonably expects that the stream of commerce will take its products.

Petitioner particularly advocates strict adherence to the concept of territoriality in interpreting the *Due Process Clause*. The test recognizes territoriality while relaxing the standard for finding it to comport with the free flow of commerce across State lines. The test allows a manufacturer prospectively to opt out of sales into a jurisdiction to whose legal system it objects. To the extent there is any conflict between the test and territoriality, "Due process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)]. . . ." *Burnham, supra*, 495 U.S. at 617 (Scalia, J.).

A similar objection is that stream of commerce effectively erases state lines, thereby "contravening the notion of states as independent sovereignties in our federalist system." Product Liability Advisory Council Brief, p. 9. The test does not destroy sovereignty and in fact recognizes the sovereign rights of the States to adjudicate claims arising within their borders and to provide judicial fora for their injured citizens.

Another objection is that basing jurisdiction on "should know" where a product ends up bases jurisdiction on foreseeability alone. Organization for International Investment Brief, p. 8. The stream of commerce – reasonable expectations test does not rest

on mere "should know" or foreseeability alone. It rests on the foreseeability that is critical to Due Process:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

World-Wide Volkswagen, supra, 444 U.S. at 297 (citations omitted).

A defendant should "reasonably anticipate" out-of-state, or now out-of-country, litigation where there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King, supra,* 471 U.S. at 475 (quoting *Hanson, supra,* 357 U.S. at 253).

The act by the manufacturer that purposefully avails itself of the privilege of conducting activities within the forum State is knowingly placing its product in the stream of commerce intending that it be resold, and reasonably expecting that it would be resold in any of the States that comprise its market. One could hardly argue that a manufacturer that authorized its distributor to sell only in New Jersey did not purposefully avail itself of the New Jersey market. If the manufacturer authorized sales only in New York, New Jersey and Pennsylvania, it similarly purposefully availed itself of the market in those

three States. The same obtains for authorizing its distributor to sell in the entire United States market and therefore impliedly in any or all fifty States.

A related objection is that jurisdiction based on mere awareness depends on the actions of a third party, not the defendant itself. Product Liability Advisory Council Brief, p. 13. The error here is assuming that jurisdiction is based on mere awareness. The manufacturer is held to account when it reasonably expects that the product will come to rest in the forum State, and that occurs when the manufacturer itself authorizes sale to every State and thus to each State.

Amicus AAJ agrees that the same personal jurisdiction test that applies to finished-product manufacturers should apply to component-product manufacturers. Under the stream of commerce – reasonable expectations test, Dow Chemical Canada placed its products in the stream of commerce, reasonably expecting them to end up in the United States. *See* Brief of *Amicus Curiae* Dow Chemical Canada ULC in Support of Petitioner on the Merits ("Dow Chemical Canada Brief"), pp. 1-2.

Amicus AAJ agrees that the same personal jurisdiction test that applies to foreign manufacturers should also apply to United States manufacturers.

Petitioner is concerned about a person anywhere in the world whose products end up in New Jersey, "a place the person may never have heard of." Brief for Petitioner, p. 36. An individual manufacturing Thai

souvenirs in Thailand whose product is bought by an ultimate consumer visiting from New Jersey may truly never have heard of New Jersey. That Thai manufacturer will not be held to account in New Jersey, because he did not place his product into the stream of commerce, reasonably expecting that it would be sold in the United States. On the other hand, sophisticated manufacturers should be held to knowledge of the federated structure of the United States and should be charged with knowledge of the laws of the various States, just as United States manufacturers are charged.

A United Kingdom manufacturer who deliberately chooses not to know where its U.S. distributor sells its products will not escape jurisdiction by the ostrich defense, because the test is what a manufacturer would reasonably have expected, not what a manufacturer unreasonably and deceptively did. *See DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.) ("the fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule . . . by professing ignorance of the ultimate destination of its products"), *cert. den.*, 454 U.S. 1085 (1981).

Defendants complain about the expense and time of jurisdictional discovery. Chamber of Commerce Brief, pp. 16-17. The stream of commerce – reasonable expectations test, however, is a straightforward, simple test. Further, "[i]n the mine run of cases, jurisdiction 'will involve no arduous inquiry'. . . ."

Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 436 (2007) (citation omitted). If the inquiry does appear arduous, a defendant in federal court can always move to dismiss under *forum non conveniens* prior to jurisdictional discovery, *id.* at 425, and a defendant in state court can make the same motion. Any cost of discovery should be seen as a cost of doing business in the United States. *See* Litan, p. 24 ("most foreign investors will tend to be forgiving of any warts because the profits from investing here are likely to more than cover the costs associated with the problems").

Petitioner argues that certain States "pose a greater challenge, and thus a greater risk of loss," to manufacturers. Brief for Petitioner, pp. 19-20. It cites an article by the American Tort Reform Association titled "Judicial Hellholes, 2009." Brief for Petitioner, p. 20. The "Judicial Hellholes" are South Florida; West Virginia; Cook County, Illinois; Atlantic County, New Jersey; the New Mexico appellate courts; and New York City. The "Watch List" of Judicial Hellholes includes California and Alabama. American Tort Reform Association, "Judicial Hellholes, 2009," p. 1, *available at* www.atra.org/reports/hellholes/.

Petitioner and its *amici* have a remedy to escape Judicial Hellholes. As this Court has said, "if the risks are too great," a corporation can sever its connection with that State. *World-Wide Volkswagen,* 444 U.S. at 297. This gives manufacturers the opportunity to do prospective forum shopping.

Petitioner and its *amici* complain that this remedy is inadequate. It is "unworkable from a practical perspective" and "undesirable." Organization for International Investment Brief, p. 15. If a manufacturer wishes to sell to this country, and the manufacturer wishes to avoid sales to specific jurisdictions, all the manufacturer has to do is direct that its distributors and retailers not sell its product into the States where it does not wish to sell. That is hardly difficult.

Objection is raised that a trade barrier has been erected, Brief for Petitioner, p. 28, and even that the lower court has interfered with the conduct of this country's foreign relations. Organization for International Investment Brief, pp. 22-25. In addressing these arguments, it is useful to consider the position of the United States.

The United States filed Brief for the United States as *Amicus Curiae* Supporting Petitioners ("United States *Brown* Brief") in the companion case to this one, *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76. The United States argues in *Brown* that a broad assertion of general jurisdiction there would harm the United States' foreign trade and foreign affairs interests. United States *Brown* Brief, pp. 28-34. On the other hand, the United States found no such problem in cases like the present where personal jurisdiction was based on specific jurisdiction:

> With respect to certain questions of personal jurisdiction that are largely not

> presented here [in *Brown*], the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. For example, United States residents benefit from the availability of convenient domestic fora to obtain redress for injuries caused by foreign entities. That interest, however, is often vindicated by *reasonable exercises of specific jurisdiction*, without resort to general jurisdiction.

United States *Brown* Brief, p. 28 (emphasis added).

One thing is certain. If this Court adopts the stream of commerce – reasonable expectations test, New Jersey has constitutional personal jurisdiction over the Petitioner, who placed its machine in the stream of commerce, reasonably expecting it to be sold anywhere in the United States.

C. Petitioner's and Its *Amicis'* Embrace of the "Stream of Commerce – Plus" Test Employs a Fiction to Create a Roadmap to Immunity.

The "stream of commerce – plus" test set forth by Justice O'Conner in *Asahi, see Asahi, supra,* 480 U.S. at 112, has been embraced expressly or effectively by Petitioner and its *amici.* This Court should not adopt the stream of commerce – plus test because it has been misused in order to avoid responsibility for defective foreign products and because it does not comport with the reality of modern commerce. Petitioner and its *amici* have started with a fiction and on

it constructed a roadmap to grant all foreign manufacturers absolute immunity from jurisdiction in U.S. States. This is a misuse of the stream of commerce – plus factors.

The fiction is that intending to sell products to any State in the United States does not manifest the purpose of selling products to any particular State. Petitioner and its *amici* would have this Court believe that even though they are willing to have products sold anywhere in the United States market, that somehow does not evidence an intention to avail themselves of the markets in New Jersey or California or New York or Michigan or any other particular State. A product cannot be sold in the United States without being sold in one or more of the fifty States.

The Product Liability Advisory Council argues that to establish jurisdiction, the defendant must have "purposefully directed its activities *to the forum state*, not merely to a geographical region that includes the forum state." *Id.*, p. 25 (emphasis in original). This means that unless the manufacturer explicitly stated that it wanted to sell in fifty named States, selling in the "geographical region" where those States are located is not enough. This is a breath-taking philosophical construct: floating somewhere over States are "geographical regions" that are not parts of States. Merely to state this proposition is to expose the incongruity between the global sales market which flows readily from country to country and State to State, and a justice system that remains

mired in outdated interpretations of the *Due Process Clause*.

Petitioner and its *amici* use the fiction that fifty does not include one to create a roadmap to immunity. The roadmap is simple: it can be called "don't ask, don't tell." A foreign manufacturer employs a separate corporation to distribute its products in the United States. The foreign manufacturer does not ask where in the United States the distributor plans to sell its products, nor does the foreign manufacturer tell the distributor where to sell its products in the United States. Then, based on a strict construction of the stream of commerce – plus test, the foreign manufacturer says it did not act purposefully toward any particular State, and so it escapes jurisdiction in every State.

Petitioner is open that that is its purpose. Petitioner says that "[a]ll are entitled to trade with the United States without being dragged into New Jersey courts in derogation of our Constitution and New Jersey's proper role in our federal system." Brief for Petitioner, pp. 18-19. Petitioner then refers to "the fear that a foreign producer of goods could be immune from suit in every state, even though the producer would be amenable to suit in another country." *Id.*, p. 37. That other country in the instant case is the United Kingdom. *See id.* Petitioner does not note that in 2007, approximately 42 percent of imported consumer products came from China. Import Safety Strategy, p. 3.

For an individual worker injured in New Jersey or any other State, the "remedy" of suit in the United Kingdom is just as illusory as the "remedy" of suit in China: he cannot afford either. This Court recognized over fifty years ago that "[w]hen [insurance] claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign [here meaning a distant State] forum – thus in effect making the company judgment proof." *McGee, supra,* 355 U.S. at 223. This is precisely what Petitioner desires here: immunity from any suit anywhere in the United States.

The U.S. Chamber Institute for Legal Reform has given foreign manufacturers explicit suggestions how to minimize their exposure to legal liability in the United States. *See* Litan, pp. 29-32. The Institute's parent organization, the Chamber of Commerce, leaves no doubt as to its purpose:

> Those limits may, of course, result in certain cases where a citizen of the forum state is injured in the forum state by an overseas manufacturer's product and yet not have an American forum in which to sue the manufacturer.

Chamber of Commerce Brief, p. 19.

The Chamber admits that it could be charged with creating a roadmap to immunity:

> While it may be objected that this distinction provides companies a roadmap for how to structure their operations in order to

> avoid judicial jurisdiction, that complaint is both inaccurate and ignores one of the central purposes of the Due Process constraints on state courts' exercise of judicial jurisdiction.

Id., p. 24.

According to the Chamber, the complaint is inaccurate because the plaintiff "may have remedies in other forums." *Id.* The Chamber does not admit, as Petitioner does, that those other fora are overseas. A central purpose of the *Due Process* constraint, according to the Chamber, is that potential defendants should have predictability about conduct that will subject them to jurisdiction, citing *World-Wide Volkswagen, supra,* 444 U.S. at 297. However, what *World-Wide Volkswagen* said was that the *Due Process Clause* "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to *where that conduct will and will not render them liable to suit.*" *Id.* (emphasis added). The Chamber and Petitioner would change the italicized words to "how their conduct can render them immune from suit anywhere in the United States." *World-Wide Volkswagen*, and we submit, the stream of commerce – plus test in *Asahi*, never intended to authorize a roadmap to render overseas manufacturers immune from suit in every State in this country.

One reason that manufacturers can misuse the stream of commerce – plus factors is that many of those factors are no longer commercially meaningful,

at least with regard to imports. *See Asahi, supra,* 480 U.S. at 112 (O'Connor, J.) (listing the plus factors). Almost nothing is designed for a particular State, other than souvenirs or sports apparel. Machines that chew metal are not designed for specific jurisdictions. Pharmaceuticals from Canada or the United Kingdom are not designed for particular States. Toys from China are not designed for particular States. Nor are most other products that could cause injury.

There is advertising directed to particular States, such as local automobile dealers or local food or clothing chains. However, a substantial percentage of ads are placed pursuant to national ad campaigns for products like foreign cars. These ads are placed on television, radio, newspapers, trade magazines and the internet[2] – all of which reach consumers in the States where they reside with the intent of encouraging the purchase of these products either through local retailers or by interstate shipment.

[2] One *amicus* requests that this Court rule that internet advertising is not directed to a particular State. Chamber of Commerce Brief, pp. 24-26. This question need not be reached if the Court adopts the stream of commerce – reasonable expectations test. Even if the Court adopts a stream of commerce – plus test, we suggest that it is premature to address internet advertising. There are variations in web sites, such as those that are interactive, and the issue has not been briefed thoroughly by the parties. Nevertheless, it should be noted that a manufacturer whose website is seen within a given State and who receives an order from that State can always decline the order if it objects to the legal system in that State.

Channels for providing regular advice to customers in the forum State are no longer particular to a State as opposed to directed to all States. The channel for advice today is likely to be a central call center in the United States or India.

"[M]arketing the product through a distributor who has agreed to serve as the sales agent *in* the forum State," *Asahi,* 480 U.S. at 112 (O'Connor, J.) (emphasis added), implies that the distributor will travel physically to the forum State. That is outdated. Distributors are often charged with selling a product in many or all of the fifty States. Commerce is often conducted from a central location by telephone, internet and overnight delivery, as well as sales through retailers. The sheer volume of the products imported through distributors or large retailers virtually assures that the intent is to sell the product throughout the fifty States.

Finally, the Chamber of Commerce suggests waiting for Congress to "fill the gap" through federal legislation. Chamber of Commerce Brief, p. 19. This suggestion is based on the neutral footnote on this subject in *Asahi, supra,* 480 U.S. at 113 n.* (O'Connor, J.). The Chamber of Commerce thus suggests that until and unless Congress passes a statute, foreign manufacturers should be free to sell to all fifty States without being held to account in any. The Chamber does not inform this Court that the present Bill in Congress focuses on service, and the reduction of the inefficiency of service in foreign jurisdictions, with only a secondary reference to

jurisdiction. The Chamber does not tell this Court that that Bill would require consent to jurisdiction in only one State, which could be nearly as illusory a remedy for citizens as jurisdiction in the United Kingdom or China.

The main reason why this Court should not wait for Congress is that jurisdiction in State courts comports with the *Due Process Clause*.

♦

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 09-1343

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In The

Supreme Court of the United States

♦

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *ET UX.*,

Respondents.

♦

On Writ Of Certiorari To The New Jersey Supreme Court

♦

BRIEF OF AMICI CURIAE ARKANSAS, ARIZONA, HAWAI'I, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSOURI, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, & WEST VIRGINIA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, including New Jersey, may be subject to *in personam* jurisdiction of a New Jersey court in a products liability action when its product causes injury in that State.

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INTEREST OF AMICI CURIAE

The question presented in this case is the extent to which each State may constitutionally exercise its jurisdiction over foreign defendants whose products cause harm within the State. The amici, Attorneys General of the signatory States, have a significant interest in the resolution of that question. Each State has a compelling interest in protecting its citizens from dangerous or defective products and providing a forum for relief when such a product causes harm. Each State also has an interest in protecting its citizens from being unjustly haled into the courts of other States. The States have an interest in the articulation of a clear rule governing personal jurisdiction in the products liability context to provide guidance to our courts and our citizens.

♦

SUMMARY OF THE ARGUMENT

Pursuant to traditional police powers, States undeniably have authority to protect their citizens from dangerous and defective products and provide a forum for relief when such a product causes harm. Personal jurisdiction doctrine limits these powers only to the extent necessary to serve two important goals: preserving the balance of power between the States and protecting the due process rights of individuals, which the Court has held includes the right to choose those jurisdictions to whose authority one submits himself. The Court's personal jurisdiction

jurisprudence has always contained an element of free will, first expressed in *Pennoyer v. Neff*, 95 U.S. 714 (1850), through the defendant's choice to be physically present within the State's territorial boundaries, and later embodied in the intent requirements inherent in "voluntary minimum contacts" and "purposeful availment." *See, e.g., International Shoe v. Washington*, 326 U.S. 310, 316 (1945), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The Court has explicitly recognized the need for personal jurisdiction jurisprudence to adapt to advances in technology and changing business practices, but emphasized that the rule must always contain an element of intent in order to satisfy due process. *See Hanson v. Denckla*, 375 U.S. 235 (1958).

Following *Asahi*, lower courts have successfully adapted the stream of commerce theory to internet-based commerce, developing a sliding scale that focuses on the extent and type of internet communications at issue. These cases demonstrate that the Court's "purposeful availment" rule works best when courts are free to evaluate purpose in light of the particular facts of each case rather than being hamstrung by narrow formulas or outdated examples. The Court should heed the warning in *Hanson v. Denckla* and articulate a clear yet flexible test for "purposeful availment" that allows lower courts to evaluate a defendant's intent in much the same way that courts regularly assess intent as an element in both civil

and criminal cases: by drawing reasonable inferences from both direct and circumstantial evidence. It is axiomatic that a defendant is presumed to intend the natural and predictable consequences of his voluntary actions, and this is no less true when applied to the personal jurisdiction context. When evaluating a defendant's intent to serve the forum State market, courts should be free to examine the entire universe of relevant evidence, including the defendant's use of new technology or innovative business practices to reach the forum State in unexpected ways.

This case involves two business practices: the Petitioner's use of an authorized nationwide distributor and its choice to target the entire United States market. Neither of these practices shields Petitioner from personal jurisdiction. First, the Question Presented states that Petitioner "targets the United States market for the sale of its products." Pet. Br. *i*. The fact that it accomplished this goal by utilizing an independent distributor does not offend the free will requirement because the decision to target the United States market was Petitioner's own. Second, the fact that Petitioner intended to serve the entire nation strengthens rather than weakens the inference that Petitioner intended to serve the New Jersey market. Because it targeted the nation as a whole, Petitioner cannot avoid liability by claiming that it never contemplated New Jersey as a possible market for its goods. That argument can only be described as willful blindness. New Jersey is a State within the union and falls within the geographic boundaries of Petitioner's

chosen market. Where a party designates a particular market for its products, it should logically be deemed to have included all component parts of that market. If it wishes to avoid jurisdiction in any particular area, it may do so by either defining its market more narrowly or taking reasonable steps to avoid sales to the excluded State. Here, Petitioner engaged in a distribution scheme authorizing its distributor to sell its products to consumers across the country with no indication that it wished to exclude sales to New Jersey residents.

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ARGUMENT

I. THE FIRST PRINCIPLES OF PERSONAL JURISDICTION: STATE POLICE POWERS, HORIZONTAL FEDERALISM, AND INDIVIDUAL LIBERTY

While the specific formulas have changed in order to keep pace with advances in technology and business practices, the Court's personal jurisdiction jurisprudence has always been informed by three fundamental principles. First, the States have a paramount interest in protecting their citizens from dangerous and defective products and the authority to do so pursuant to their traditional police powers. Second, each State's ability to exercise its power is limited by the concomitant powers of all other States, and each State's reach may not extend so far as to infringe upon the sovereignty of any of its sister States. Third, every individual has the right to choose

the jurisdictions to whose authority he voluntarily submits himself. This section of the brief examines these fundamental principles, while the next section illustrates how the Court's opinions have allowed the specific jurisdictional test to adapt to evolving commercial practices. In a later section, the brief argues that the Court should adopt a simple yet flexible rule for evaluating the defendant's intent to avail himself of the forum State market in much the same way that courts regularly evaluate intent as an element in both civil and criminal cases: by drawing reasonable inferences from available direct and circumstantial evidence. Finally, the brief argues that the lower court correctly concluded that Petitioner intended to avail itself of the New Jersey market where it targeted the entire United States as its intended market, took direct steps to advertise and sell its products to consumers across the Nation, made no distinctions between the individual States that make up that market, and gave no indication that it wished to exclude New Jersey.

The first principle of personal jurisdiction has been that each State has a paramount interest in protecting its citizens from dangerous products and providing a forum for relief when such a product causes injury or death. Products liability is a "traditional area of state regulation." *United States v. Morrison*, 529 U.S. 598, 615 (2000). As the Court has previously recognized in the preemption context, the States have traditionally regulated dangerous products in order to protect the public health, safety, and

welfare. *See Wyeth v. Levine*, ___ U.S. , 129 S.Ct. 1187, 1194-1195 (2009) (applying the presumption against preemption in a drug labeling case based upon the historic presence of state law causes of action that would cover such claims). In the choice of laws context, federal courts have long recognized that "[i]n product liability claims, the primary interest of the State is to deter the sale and/or manufacture of negligently or defectively manufactured goods to that State's citizens." *Cheatham v. Thurston Motor Lines*, 654 F.Supp. 211, 214 (S.D. Ohio 1986), *see also Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1360 (8th Cir. 1994) (holding that Canada, as the State where the injury occurred, had the most significant interest in the resulting product liability claim because its interest in protecting citizens from harmful products and protecting the expectation interests of victims far outweighed Missouri's interest in deterring wrongful conduct by its manufacturers). For example, in *Spence v. Glock, Ges.m.b.H*, 227 F.3d 308 (5th Cir. 2000), the Fifth Circuit reversed class certification and found that Georgia law did not apply to all of the plaintiffs' tort claims, reasoning that all 51 relevant jurisdictions in which class members are domiciled and purchased defective guns have an interest in ensuring that their consumers are adequately compensated. 222 F.3d at 314; *see also In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332, 348 (D.N.J. 1997). The Fifth Circuit noted that each State may have a different understanding of what adequate compensation is and may view the manufacturer's home State as providing insufficient

protection for its citizens. *Id.* These cases illustrate a point that needs little explanation: each State has an overriding interest in protecting its own citizens from harmful products, providing a forum for relief, and deterring the sale of such products within its borders.

Although each State clearly has a strong interest in regulating dangerous and defective products and has the authority to do so pursuant to its traditional police powers, the nature of our federal system prevents it from doing so in a way that tramples upon the parallel powers of other States. Each State has a "vertical" relationship with the federal government and a "horizontal" relationship with all other States. While the Supremacy Clause elevates federal law above state law, each State has power and authority equal to that of its sister States. Under the Tenth Amendment, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X. The term "respectively" references the fact that the States' powers, though significant, have a natural limit imposed by the concomitant powers of all other States. Therefore, the second fundamental principle of personal jurisdiction is that each State may only exercise its power to an extent that does not improperly infringe upon its sister States. In the context of personal jurisdiction, issues related to horizontal federalism have traditionally been couched in terms of "state sovereignty," "comity," or simply "federalism," but are most clearly understood as a recognition that the States' mutually

competitive relationship within our federal system naturally places limits upon the powers of each individual State.

Personal jurisdiction law provides necessary limitations on each State's ability to exercise its traditional police powers over defendants beyond its physical borders. The amici States recognize that an overly-broad rule allowing for sweeping personal jurisdiction would prove to be a double-edged sword for the States, for each State has an interest in protecting its citizens from unjustly being haled into other States' courts. Each State must therefore balance its interest in prosecuting foreign defendants with its interest in protecting its own citizens from being abused in foreign courts. Our citizens are, after all, not only consumers, but also manufacturers, distributors, and sales agents, and we must strive for a rule that protects the respective rights of all parties. In this way, each State has an interest in preserving the limitation on States' power that requires each State to exercise that power "respective" of the identical powers granted to our fellow States. In the context of personal jurisdiction, the limitations of "horizontal federalism" act essentially as a Golden Rule for the States. We may exercise our jurisdiction over foreign defendants to the maximum extent to which we would allow other States to exercise their jurisdiction over our own citizens. The amici are satisfied that the approach proposed in this brief adequately protects our sovereignty and the balance of horizontal federalism by limiting each State's

exercise of jurisdiction to those cases in which the defendant has demonstrated an intent to serve the forum State market.

Third, personal jurisdiction law serves to protect individual liberty. Throughout its history, the Court's personal jurisdiction jurisprudence has remained faithful to a core understanding that jurisdiction must be based upon free will, as expressed through the voluntary action requirement always included in the Court's various jurisdictional tests. These tests, which have ranged from "physical presence" to "minimum contacts" to "purposeful availment," rest upon each person's inherent right to choose the jurisdictions to which he will submit himself. In *Pennoyer v. Neff*, 95 U.S. 714 (1850), Justice Field recognized the Due Process Clause of the Fourteenth Amendment as protecting this liberty interest. The evolution of the Court's personal jurisdiction cases demonstrates that the liberty interest at stake is not simply freedom from the burden of defending suits in far-off locations, but also the right to choose, among the co-equal sovereign States, those jurisdictions to which one submits.[1]

[1] While many scholars use the term "consent" to indicate this liberty interest, and tie it directly to John Locke's natural law theory of government by consent, we will instead use "intent" or "free will." *See, e.g.*, Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev 257, 351 (1990); Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison*, 4 Nev. L.J. 141, 153 (2003) "Consent," carries with it

(Continued on following page)

The three foundational principles of personal jurisdiction jurisprudence have traditionally been balanced by the use of jurisdictional tests that rest upon the defendant's intentional conduct and ask whether he has voluntarily chosen to reach the forum State market, either physically or through the stream of commerce. Where a party has engaged in voluntary conduct demonstrating the intent to serve the forum State market, a State may properly exercise its traditional police powers over him without offending either his individual liberty or the sovereignty of other States.

The amici States respectfully suggest that lower courts should be free to determine intent based upon the totality of the circumstances, considering both direct and circumstantial evidence. Just as courts have been able successfully to evaluate intent as an element in countless criminal and civil cases, so too would they be capable of doing so in the context of determining purposeful availment. Rather than restricting courts to technical formulas or a list of soon outdated examples, courts should be permitted to reach common sense conclusions based upon not only the defendant's direct actions uniquely and

the connotation that a person may freely revoke that consent at any time, whereas, under existing personal jurisdiction law, once a party has made the voluntary choice to engage in specific conduct, he is legally deemed to have submitted himself to jurisdiction regardless of whether he subjectively wishes that he were not subject to the forum state's authority.

specifically aimed at the forum State, but also the surrounding circumstances and the defendant's reasonable expectations.

II. THE COURT HAS ADAPTED THE SPECIFIC REQUIREMENTS OF PERSONAL JURISDICTION TO ACCOMMODATE CHANGING BUSINESS PRACTICES BUT HAS ALWAYS REQUIRED AN ELEMENT OF INTENT IN ORDER TO SATISFY DUE PROCESS AND PRESERVE THE BALANCE OF POWER AMONG THE STATES

The Court has explicitly recognized that the specific requirements of personal jurisdiction jurisprudence must accommodate changes in the way Americans do business. In *Hanson v. Denckla*, 375 U.S. 235, 250-51 (1958), the Court stated,

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. State of Washington*.

(Internal citations omitted). The *Hanson* Court explained that the evolution of personal jurisdiction law

does not herald the eventual demise of all restrictions. *Id.* Limitations upon State power to exercise jurisdiction over a foreign defendant must always remain firmly rooted in an understanding of horizontal federalism and individual liberty. *Hanson* teaches that intent should not be abandoned as a foundational principle, but that the Court may adjust the ways in which intent to serve the forum State market is established, in order to accommodate advances in technology and business practices.

In *Pennoyer v. Neff*, Justice Field recognized the Fourteenth Amendment Due Process Clause as an important safeguard to both State sovereignty and the natural rights of citizens. *See, e.g.*, Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev 257, 351 (1990). Justice Field's opinion is built upon "two well-established principles of public law." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). First, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Id.* Second, that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* From these two principles, the Court fashioned a narrow territorial rule that restricted the ability of States to exercise personal jurisdiction over individuals not physically present within the State's territorial boundaries. *Pennoyer*, 95 U.S. at 723.

In *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), the Court adjusted the purely geographic territoriality of *Pennoyer* to accommodate an

"expanding concept of presence." Kogan, 63 S. Cal L. Rev. at 351. Rejecting the previous test's rigid adherence to physical boundaries, the Court in *International Shoe* refashioned the rule to analyze whether the defendant had certain minimum contacts with the forum State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court reiterated the importance of the defendant's voluntary contacts with the forum, holding that even where traditional notions of fair play and substantial justice would weigh in favor of exercising jurisdiction, the State may not do so unless the defendant has purposefully availed himself of the privileges and benefits of doing business in the forum State. 444 U.S. at 294-95. The Court also emphasized, however, that additional factors inform the reasonableness of jurisdiction given the "nationalization of commerce." *Id.* at 293 (quoting *McGee v. Intl'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Such factors include the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution possible, and the shared interest of the several States in furthering substantive social policies. *Id.* at 292. While the Court identified these reasonableness factors as important considerations, it plainly held that reasonableness alone cannot justify the exercise

of personal jurisdiction over an individual who has not voluntarily established minimum contacts with the forum State. *See* Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison*, 4 Nev. L.J. 141, 153 (2003). The Court thereby adapted its personal jurisdiction jurisprudence to changing markets, while recognizing and remaining faithful to the principle that jurisdiction must be based upon free will and the intent to serve the forum market. *See Id.* at 151-53.

In *World-Wide Volkswagen*, the Court articulated an approach to personal jurisdiction that hinges on the exercise of free will – each individual has notice as to the type of activities that will subject him to suit in a given State and the ability to either avail himself of the benefits of doing business in that State with the knowledge that doing so will allow the State to exercise jurisdiction over him, or alternatively, to sever ties with that State in order to avoid jurisdiction. Spalding, 4 Nev. L.J. at 153. Therefore, while a defendant's mere awareness that its products may find their way to the forum State through the unilateral actions of others is not sufficient to establish personal jurisdiction, "[t]he forum [s]tate does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by the consumer in the forum [s]tate." *World-Wide Volkswagen*, 444 U.S. at 297-98.

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Court grappled yet again with the problems posed by a dramatically changing world market which does not easily lend itself to the formulation of a lasting test for minimum contacts. The issue before the Court was whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States could reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Indus. Co.*, 480 U.S. at 105 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Eight justices agreed that subjecting the defendant to personal jurisdiction in California was "unreasonable and unfair," and therefore impermissible, regardless of whether Asahi had established minimum contacts with the State. 480 U.S. 102, 116 (plurality opinion); *id.* (Brennan, J., concurring in part). As to the minimum contacts analysis, however, the Court was deeply divided. *See Asahi*, 480 U.S. at 103-04.

Four justices found that Asahi had established minimum contacts with California. *Id.* at 116 (Brennan, J., concurring in part). In this view, the "stream of commerce" referred to the "regular and anticipated flow of products from manufacture to distribution to retail sale" and necessarily contains an element of notice to the defendant. *Id.* at 117. Although Justice

Brennan's test is often referred to as one of foreseeability, it is more accurately understood as one of clear expectation. Justice Brennan cited *World-Wide Volkswagen* to emphasize that, while foreseeability is not wholly irrelevant to the inquiry, "the foreseeability that is critical to the due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." 480 U.S. at 118 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). Brennan again quoted *World-Wide Volkswagen* to stress that "[t]he forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers in the forum State*," adding his own emphasis to differentiate this type of expectation from the mere foreseeability that one's products *may* be purchased by forum State consumers. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

Justice O'Connor, also writing for four justices, found that Asahi lacked sufficient minimum contacts with California. *Asahi*, 480 U.S. at 112-13. Justice O'Connor's approach would require additional voluntary actions evincing an intent or purpose to serve the forum State market. *Id.* at 112. To illustrate her point, Justice O'Connor provided several examples of "additional conduct" that would be sufficient to establish minimum contacts: designing the product for the

market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Id.* Since *Asahi*, Justice O'Connor's enumerated examples have essentially become keys to unlocking personal jurisdiction, with litigants trying to fit modern-day practices into these few pigeonholes of "additional conduct" accepted as sufficient to support jurisdiction. *See, e.g.*, App. 21a, 24a.

Justice Stevens disagreed with both Justice Brennan and Justice O'Connor. *Asahi*, 480 U.S. at 121-22 (Stevens, J., concurring in part). According to Justice Stevens, something more than mere awareness must be required, but there are no clear dividing lines between "mere awareness" and "purposeful availment." *Id.* In Justice Steven's view, whether conduct rises to the level of purposeful availment requires a fact-specific determination, which must consider the volume, value, and hazardous character of the products at issue. *Id.* at 122.

After *Asahi*, lower courts have required varying levels of contact to establish personal jurisdiction under the stream of commerce theory, unable to agree upon the exact test to apply. *See* Christopher Porterfield, *Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets*, 20 Ga. St. U. L. Rev. 539, 550-51 (2003). Yet, in the area of internet commerce, lower courts have gradually

developed a body of law that is illustrative of the type of rule the Court should now adopt more generally. Courts dealing with internet commerce have remained faithful to the intent requirement, but have allowed the defendant's intent to be inferred based upon the specific type and quantity of activity it conducts over the internet. This flexible approach has allowed the stream of commerce theory to adapt to a dramatically changing commercial landscape, which now includes internet websites, social media, and interactive applications for mobile devices.

Today, new technology and business practices make the sale of goods across state and national borders both easy and commonplace. The Sixth Circuit Court of Appeals has noted that the internet represents the culmination of trends toward a global marketplace because the internet allows anyone "to operate an international business cheaply, and from a desktop." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). Several lower courts have adapted the stream of commerce theory to this new context by fashioning a rule requiring that the defendant's intent to reach the forum market be demonstrated through deliberate conduct, but allowing courts to consider, as a part of that intent inquiry, the nature of the defendant's website, the nature and quantity of information exchanged between the parties over the internet, the website's level or interactivity, and the defendant's history of conducting business over the internet (both inside and outside the forum State), and other facts indicating the intent

to transact business. *See* Carly Henek, Note, *Exercises of Personal Jurisdiction Based on Internet Web Sites*, 15 St. John's J. Legal Comment 139 (2000). The internet rule allows courts to examine all relevant evidence and exercise jurisdiction where the evidence indicates that the defendant either engaged in conduct uniquely aimed at the forum State or, if its activities were aimed more broadly, it expected or hoped that the results of its conduct would include availment of the forum State market.

Just as the Court in *Asahi* held that foreseeability that one's products will enter the forum State is not enough, on its own, to establish jurisdiction, lower courts have held that "the mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum"; and "[s]omething more is necessary, such as interactive features which allow the successful online ordering of the defendant's products." *Cossaboon v. Maine Medical Center*, 600 F.3d 25, 35 (1st Cir. 2010) (quoting *McBee v. Delica Co.*, 417 F.3d 107, 124 (1st Cir. 2005) (addressing analogous issue of extraterritorial jurisdiction under the Lanham Act)); *see also Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549 (7th Cir. 2004); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 399 (4th Cir. 2003); *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 483 (6th Cir. 2003) (per curiam); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002). In *Zippo Mfg. Co.*

v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 42 U.S.P.Q.2d (BNA) 1062 (W.D. Pa. 1997), the federal district court elucidated a "sliding scale" test for personal jurisdiction based on the nature and quality of commercial activity conducted over the internet. The test focuses on whether the website is merely passive, providing information to an interested party, or interactive, allowing the party to communicate with the website author, especially when that interaction allows the party to purchase goods or services via the website. *Id.* This test was adopted and modified by a federal district court in Oregon in *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999), to include a "deliberate action" requirement, which is satisfied if the defendant either engaged in transactions with forum State residents or purposefully directed its conduct to the forum State. 33 F. Supp. 2d at 921. The *Zippo/Millennium* test has been much quoted and generally followed by other jurisdictions. Richard E. Kaye, Annotation, Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long Arm Statutes and Due Process Clause, 81 A.L.R. 5th 41, § 5 (2000). These cases demonstrate that, since the Court decided *Asahi*, lower courts have created a workable framework for analyzing personal jurisdiction in the completely new world of internet commerce by maintaining the purposeful availment requirement but allowing courts to consider all relevant evidence to evaluate intent.

III. THE COURT SHOULD PRESERVE THE PURPOSEFUL AVAILMENT TEST BUT ALLOW LOWER COURTS TO APPLY IT MORE FLEXIBLY

To echo Justice O'Connor's opinion in *Asahi*, in each case the court must determine whether the defendant's conduct indicates an *intent or purpose* to serve the market in the forum State. *See Asahi*, 480 U.S. at 112. The amici States respectfully ask that the Court adopt a flexible approach that preserves the intent requirement but allows courts to establish intent to serve the forum State market through consideration of the complete universe of relevant evidence. Such evidence could include specific conduct aimed uniquely at the forum State, the expectation that one's products will be purchased by residents of the forum State, business decisions made in reliance on that expectation, the extent to which the defendant benefits from transactions with the forum State, the use of new technology or marketing techniques to reach the forum State in innovative ways, and the scope and nature of the market which the defendant voluntarily chooses to target (for example, whether the products were explicitly aimed at a nationwide market or a smaller local market). Conversely, courts should also consider any evidence evincing a desire *not* to do business in the forum State, such as the defendant's instructions to its distributor or the refusal to advertise or ship products to the forum State.

As the Court's previous personal jurisdiction cases have shown, the rule must be flexible in order to withstand the test of time. Each rule the Court has previously articulated has eventually been bypassed by technical innovations and evolving business practices that allow the purveyors of dangerous and defective goods to reach our States in ways unanticipated by the controlling legal test. Each time this has happened, the States have been hindered in their ability to protect their citizens from dangerous and defective products until the Court has articulated a new test. As demonstrated above, the Court's precedents allow for, and in fact encourage, the use of a flexible evolving test, so long as it stays true to the constitutional touchstone of free will by imposing an intent requirement. *See Hanson v. Denckla*, 375 U.S. 235, 78 S. Ct. 1228 (1958). The rub comes in trying to determine the minimum level of conduct necessary in order to infer intent or purpose. The Court in *Asahi* split over this issue, but we contend that Justice Brennan's focus on the defendant's expectation and Justice O'Connor's emphasis on voluntary conduct are not mutually incompatible. In fact, when used together, they allow courts to infer intent to avail oneself of the forum State market in much the same way that state and federal courts are able to successfully assess intent as an element in both civil and criminal cases every day.

IV. COURTS SHOULD BE ALLOWED TO INFER INTENT TO SERVE THE FORUM STATE MARKET BY DRAWING REASONABLE CONCLUSIONS FROM BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE

In other areas of the law, it is not uncommon for courts to determine intent or purpose by asking whether the defendant specifically desired to bring about the prohibited outcome or whether the defendant expected that his actions would bring about that result and proceeded to engage in the conduct. *See* Model Penal Code § 2.02. The same approach is valid for assessing a party's intent to serve the forum State market. The Court has previously emphasized that fact-finders may infer intent from conduct, stating that, "[i]ndeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established." *Rose v. Clark*, 478 U.S. 570, 581 (1986) (citing *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *Ulster County Court v. Allen*, 442 U.S. 140, 157-163 (1979)). "It is a general axiom of law that every sane person is presumed to intend the ordinary, natural, probable, or necessary consequences of his or her voluntary, intentional, and deliberate act." 40A Am. Jur. 2d Homicide § 251 (2010). To prove murder, it is thus unnecessary to prove that the defendant subjectively had the specific intent to kill or do great bodily harm, or that the defendant knew with certainty that his or her acts would achieve murderous results; it is sufficient to show that the defendant voluntarily and willfully committed an

act, the natural tendency of which was to destroy another's life. *Id.*

From the Court's use of terms such as "voluntary," "deliberate," and "purposeful," it appears that the Court may require some level of willfulness beyond simple probability. Looking again to criminal law for guidance, the Model Penal Code § 2.02 states that "[a] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code, § 2.02(8), General Requirements of Culpability. The Model Penal Code states that a person acts knowingly with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Model Penal Code, § 2.02(2)(b).

The amici States suggest that, in the context of determining whether a defendant intended to avail himself of the privileges and benefits of doing business in the forum State, courts should similarly be allowed to infer the defendant's intent by drawing reasonable conclusions informed by all relevant evidence. This evidence could include direct actions

aimed specifically at the forum State or the lack thereof, but should also include the surrounding circumstances and the defendant's reasonable expectations. Courts should be permitted to reach common sense conclusions rather than being needlessly constrained by outdated examples, such as those found in Justice O'Connor's *Asahi* opinion. Such an approach respects the fundamental requirement that jurisdiction be based upon free will. A party will not be deemed to have purposefully availed itself of the forum market if its products reached the forum State through mistake, inadvertence, or the unilateral actions of third parties. At the same time, a general rule framed in the language of intent would prove to be flexible enough to adapt to future technologies and business practices that are unforeseeable to us today. Such rules have already proven to be flexible enough to allow for the infinitude of ways that intent may be demonstrated in criminal cases.

A party would also be able to "opt out" of jurisdiction in any State in which it does not wish to be subject to suit. For example, if Petitioner had wished to target the United States as a whole but felt that New Jersey law was too onerous, New Jersey courts were unfairly biased, or that traveling to New Jersey to defend a products liability suit would pose too great a burden, the company would be free to exempt New Jersey from its nationwide market by taking reasonable steps to avoid that State's market. The company could instruct its distributor not to sell products within New Jersey or to New Jersey

residents, could refuse to advertise there, or could refuse to ship its products to the State. Such measures would only be necessary when a defendant chooses to define its targeted market broadly but wants to exclude from that market some component jurisdiction.

V. PETITIONER PURPOSEFULLY AVAILED ITSELF OF THE NEW JERSEY MARKET BY UTILIZING A NATIONWIDE DISTRIBUTION SCHEME WHICH TARGETED THE ENTIRE UNITED STATES

At the heart of this dispute is the fact that companies are now able intentionally to define their target markets, and those markets now operate on a scale that does not necessarily differentiate among political subdivisions within the whole. Petitioner purposefully utilized an exclusive nationwide distributor to market and sell its products throughout the United States and, therefore, chose to define as its target market the entire country. The Petitioner's Question Presented acknowledges that "the manufacturer targets the United States market for the sale of its products." Pet. Br. *i*. Although Petitioner's own language assumes that it targeted the entire United States as its chosen market for its products, it argues that its exclusive distributor was the party which actually sold the products nationwide, and that it cannot be held responsible for the actions of distributor third party. Having framed the question as one in which the manufacturer "target[ed] the United States

Market," Petitioner should not be permitted to hide behind its exclusive distributor and claim it had no part in the sale of its product in the United States. Just as the use of an internet website is a new and innovative marketing approach which allows businesses to reach consumers in unexpected ways, the Petitioner's use of an exclusive American distributor to accomplish Petitioner's goal of "target[ing] the United States Market" is a business practice to which jurisdictional jurisprudence must adapt. Petitioner identifies three lower-court cases extending jurisdiction over foreign defendants based upon each company's use of an independent distributor to accomplish specific sales and marketing goals, arguing that these cases demonstrate courts' tendency to abuse Justice Brennan's stream of commerce test. Pet. Br. 45-46. Rather than demonstrating abuse, these cases simply indicate that the use of an independent distributor is now a recognized way in which some companies choose to accomplish their sales goals.

Petitioner also takes issue with the New Jersey Supreme Court's conclusion that, by targeting the United States as a whole, it necessarily targeted each and every State, including New Jersey. *See* Pet. Br. 28-29 ("The New Jersey Supreme Court found that only the United States was in Petitioner's sights . . . [but n]o jurisdictional evidence was presented that J. McIntyre had ever taken the slightest purposeful act toward New Jersey."). Petitioner is, therefore, arguing in favor of a specific aiming requirement which would shield it from personal jurisdiction absent proof that

it targeted the forum State in some *unique way* and took specific steps aimed *solely* at the forum State. Such a rule is inapplicable where the defendant targets the forum State by targeting all States equally within a national distribution scheme. Moreover, a direct aiming requirement could allow companies to freely market dangerous or defective products nationwide at a reduced risk of liability as compared to local businesses. Simply by utilizing new technology, such as an internet website or a mobile phone application, which would make it feasible to target the United States as a whole without ever establishing a physical presence in any State, foreign companies would be able to sell dangerous or defective products in the United States without having to factor in the additional cost of defending lawsuits and facing liability when those products cause harm.

Such a rule is not only dangerous, it ignores the plain understanding that the "entire United States" necessarily includes each and every State. When a party intentionally defines its target market as a discrete geographic area and takes active steps to serve the consumers in that geographic area, without differentiating between political subdivisions within the whole, the party must necessarily be deemed to have targeted every jurisdiction which is physically located within the market it has defined. A nationwide marketing scheme is sufficient to establish purposeful availment as to the entire United States.

Similarly unpersuasive is Petitioner's argument that it was not aware of New Jersey as a possible

sales locale for its machines. *See* Pet. Br. 28. As stated, Petitioner knowingly marketed its products to the United States as a whole. New Jersey unequivocally falls within that target market. Yet Petitioner now refers to New Jersey as "a place [a foreign defendant] may never have heard of." Pet. Br. 36. Ignorance of the fact that New Jersey is a State within our union, or of the specifics of New Jersey products liability law, should not allow Petitioner to avoid jurisdiction. Its own lack of research prior to embarking on a nationwide marketing campaign is no defense. Drawing again on the comparison to criminal law, Petitioner's position is as flawed as that of a criminal defendant who admits to having bombed a building with the intent to kill everyone inside and the hope of killing as many people as possible but argues that he lacked the requisite intent to kill a particular victim because he didn't know the individual and never contemplated that she might be inside the building.

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CONCLUSION

For the foregoing reasons, this Court should affirm the New Jersey Supreme Court's decision.

Respectfully submitted.

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IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,
Petitioner,

v.

ROBERT NICASTRO, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community.

Like the companion case, *Goodyear Luxembourg Tires, S.A. v. Brown* (No. 10-76), the decision below in this case raises just such vital concerns for the nation's business community. While some of the Chamber's interests in the two cases overlap, this case raises distinct issues warranting this separate brief. Specifically, unlike *Goodyear*, this case concerns claims *related to* defendant's act of allegedly placing the goods in the stream of commerce. That issue occupied the Chamber's members long before this Court's decision in *Asahi*, and the splintered opinions in that case only have compounded the difficulties, as Petitioner pointed out in its petition for a writ of *certiorari*. Resolving this question left unsettled by *Asahi* will provide American business essential guidance about the jurisdictional consequences of their decisions regarding how to organize their affairs and to sell their products. The Chamber is uniquely positioned to explain the broader commercial implications of the possible approaches to this issue.

SUMMARY OF THE ARGUMENT

This Court should adopt the additional conduct test announced by the plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987). Under that test, the mere act of placing a good in the stream of commerce where the defendant knows (or

can foresee) that it might reach the forum state does not satisfy the constitutional standard for personal jurisdiction over a non-resident defendant. Instead, the plaintiff must identify "additional conduct" showing that the defendant purposefully directed its activities at the forum state. Because the lower court failed to apply that test, its judgment should be reversed. In addition to the reasons given in Petitioner's brief, this brief offers four novel arguments.

First, the additional conduct test best comports with three bedrock principles that underlie the Due Process limits on state court assertions of judicial jurisdiction. Those three bedrock principles include (A) the defendant's own contacts (and not the contacts of some other party) are the only relevant ones in the constitutional analysis; (B) the defendant's contacts with the forum state (and not some other jurisdiction) are the only ones that matter; and (C) the contacts must constitute "purposeful availment." The additional conduct test respects each of those principles. By contrast, the test applied by the lower court, which drew heavily on Justice Brennan's separate opinion in *Asahi*, does not. Both the lower court's test and Justice Brennan's test impute third-party contacts to the defendant, sweep in the defendant's contacts with jurisdictions other than the forum state and dilute the "purposeful availment" requirement.

Second, a more relaxed stream-of-commerce test such as that adopted by the court below—especially its requirement that the nonresident defendant prove it sought to prevent entry of the goods into the forum state—has deleterious consequences for the American economy and American business. That requirement cripples interstate and foreign commerce, much like a

state statute designed to undermine the flow of goods into the state. It also has an especially harsh effect on small businesses who supply component parts to large-scale manufacturers. Those small businesses cannot control where downstream companies will ultimately sell the finished goods containing their parts; the lower court's rule forces them to choose between risking suit in a faraway forum and cutting off an important commercial relationship. Finally, the decision below will bog down companies and courts in expensive and time-consuming jurisdictional discovery. As the seven-plus year history of this case perfectly illustrates, complex jurisdictional tests invite such one-sided discovery which is then used to pile costs on the non-resident defendant and to tie up the judicial system in collateral litigation.

Third, to the extent the Court is concerned about the results of a rule that would leave resident plaintiffs without a United States forum in which to sue foreign defendants, Congress might authorize federal courts to exercise personal jurisdiction based on the defendant's nationwide contacts. Such an approach, which the *Asahi* plurality identified, harnesses the differences between the Fifth Amendment's constraints on federal courts and the Fourteenth Amendment's constraints on state courts. Relying on these differences, numerous lower federal courts have upheld the exercise of personal jurisdiction under Federal Rules of Civil Procedure 4(k)(1)(d) and 4(k)(2) based on a foreign defendant's contacts with the United States as a whole. In recent years, Congress has considered legislation to address a possible gap in judicial jurisdiction over foreign manufacturers. Rather than dilute the constitutional constraints on state assertions of judicial jurisdiction, this Court should allow that legislative process to run its course.

Fourth, amicus urges this Court to use this case to expound upon the meaning of several components of the additional conduct test. The additional conduct test includes "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." It would benefit the business community if this Court eliminated any misunderstanding about the meaning of this phrase. A "distributor" and an "agent" are two very different legal entities and have distinct legal relationships with a product manufacturer. Whereas a distributor is an independent company in an arms-length relationship with a product manufacturer, an agent often is not. Thus, it would be inappropriate to equate these two distinct business relationships in the jurisdictional inquiry. Furthermore, the "additional conduct" test also includes "advertising in the forum State." Again, it would benefit the business community if this Court made clear that a company's mere presence on an internet webpage that was accessible in the forum state did not constitute "advertising in the forum state." At the time the *Asahi* plurality used that term, the internet had not come of age in the commercial marketplace. In the intervening decades, the internet has assumed great importance as a marketing vehicle, especially for small businesses that require a cost-effective medium to reach a broad customer base. Some courts have stretched this language from the *Asahi* plurality opinion to find personal jurisdiction over a company by virtue of its maintenance of a website accessible in the forum state. While this case does not require the Court definitively to resolve the matter, it is an appropriate vehicle to correct that distortion of the "additional conduct" test.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT PERMIT STATE COURTS TO ASSERT JUDICIAL JURISDICTION BASED SOLELY ON A DEFENDANT'S ACT OF PLACING GOODS IN THE STREAM OF COMMERCE, EVEN WHEN THEIR ENTRY INTO THE STATE IS FORESEEABLE.

"The foundation of jurisdiction is physical power." *McDonald v. Mabec*, 243 U.S. 90, 91 (1917). Since the Fourteenth Amendment's adoption, this Court has repeatedly stressed that this Clause constrains state exercises of judicial power over non-resident defendants, including corporations. *See International Shoe Co. v Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). While *Pennoyer* employed a territoriality principle to define these limits on state power, *International Shoe* defined them in terms of the defendant's "contacts" with the forum state.

In this case, the lower court tellingly conceded that the Petitioner did not have "a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction . . . ." Appendix to Petition for a Writ of *Certiorari* ("Pet. App.") 14a. Instead, the Court recognized that "[Respondent's] claim that [Petitioner] may be sued in [New Jersey] must sink or swim with the stream-of-commerce theory of jurisdiction." *Id.*

This Court last confronted the stream-of-commerce theory of jurisdiction in *Asahi*. While it unanimously agreed that the Due Process Clause did not support the exercise of personal jurisdiction over Asahi, it divided on the reasoning. Four justices believed that the Due Process Clause "require[d] something more

than that the defendant was aware of its product's entry into the forum State through the stream of commerce . . . ." 480 U.S. at 111 (opinion of O'Connor, J., joined by Rehnquist, CJ and Powell and Scalia, JJ). By contrast, four other justices found that, while the exercise of personal jurisdiction was unreasonable, the Due Process Clause ordinarily would be satisfied if the defendant placed a product into the stream of commerce and was aware that the product had entered the forum state. *Id.* at 117 (Brennan, J., joined by White, Marshall and Blackmun, JJ.). Justice Stevens embraced a view, which has not been widely accepted by the lower courts, under which the constitutional test turned the "volume, the value and the hazardous character of the component." *Id.* at 122. *See generally* 4 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §1067.4 n. 14 (2010).

Amicus urges this Court to adopt the additional conduct test announced in Justice O'Connor's plurality opinion and to use this case to expound upon several of its features. Subpart A explains how that test is most consistent with three core principles underlying this Court's jurisprudence on the constitutional limits to state judicial jurisdiction. Subpart B explains the deleterious consequences that would flow from the adoption of a more relaxed test. Subpart C argues that, to the extent the Court is concerned about leaving some injured United States citizens without an American forum in which to sue a foreign company, Congress might authorize federal courts to exercise personal jurisdiction over those defendants based on their nationwide contacts. Finally, Subpart D identifies two features of the additional conduct test that are particularly important to the American business community and on which this Court should elaborate.

A. The "Additional Conduct" Test Announced by Justice O'Connor's Plurality Opinion in *Asahi* Best Advances The Core Principles Of The Constitutional Limits on State Judicial Jurisdiction.

Under this Court's specific jurisdiction decisions, the Due Process Clause typically requires a plaintiff to prove both that the defendant has minimum contacts with the forum state and that the exercise of judicial jurisdiction comports with traditional notions of fair play and substantial justice. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). This constitutional requirement applies to all assertions of judicial jurisdiction against defendants not "present" in the forum state. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *see also Burnham v. Super. Ct.*, 495 U.S. 604, 609-610 (1990) (plurality opinion). It "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and "ensure[s] that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Woodson*, 444 U.S. at 292. Three features of this generally applicable constitutional standard guide the determination of the proper test for assertions of judicial jurisdiction predicated on the stream-of-commerce theory.

First, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). This Court has repeatedly relied on this principle to guide the Due Process inquiry. In a series of cases, it has held that that contacts between third-parties and the forum state could not

be not used to establish the defendant's minimum contacts. *See, e.g., Kulko v. Super. Ct.*, 436 U.S. 84, 93-94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Likewise, in another line of cases, this Court relied on that principle to hold that an employer's contacts could not be attributed to an employee. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984); *Calder v. Jones*, 465 U.S. 783, 790 (1984). For example, in *Rush*, the Court held that the contacts between a defendant's insurer and the forum state did not suffice to establish that "the *defendant* engaged in any purposeful activity related to the forum . . . ." 444 U.S. at 329 (emphasis in original). Similarly, *Keeton*, explained that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary." *Keeton*, 465 U.S. at 781 n. 13. *See also Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925). At bottom, then, the critical entity for purposes of minimum contacts analysis is the defendant itself.

Second, the defendant's contacts *with the forum state* are the sole contacts relevant to the jurisdictional analysis. *See Woodson*, 444 U.S. at 298-99; *Kulko*, 436 U.S. at 94-95. In *Woodson* and *Kulko*, the Court soundly rejected the notion that the constitutionally necessary contacts could be derived from contacts in another state that bore some loose connection to the forum state. For example, in *Woodson*, the plaintiffs claimed that the sales of automobiles in New York created minimum contacts with Oklahoma due to "the fact that automobiles are capable of use in distant States like Oklahoma." *Woodson*, 444 U.S. at 298. In response, *Woodson* explained that "financial

benefits accruing to the defendant from a *collateral relation* to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." *Id.* at 299 (emphasis added). At bottom, then, the critical "forum" for purposes of the minimum contacts analysis is the State asserting jurisdiction, not another state with which the defendant might have contacts.

Third, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum state." *Hanson*, 357 U.S. at 253. This requirement is "essential" in every case. *Id.* Random, fortuitous or attenuated contacts with the forum state do not satisfy the requirement. *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985). By contrast, actively seeking out and consummating in the forum state the transaction giving rise to the claim can, under some circumstances, satisfy the requirement. *See id.* at 478; *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). For example, in *Burger King*, the Court reaffirmed that the mere execution of a contract with a forum resident alone cannot "automatically establish sufficient minimum contacts in the other party's home forum." 471 U.S. at 478-79. Rather, under the "contracts plus" approach of that decision, additional indicia such as "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts. . . ." *Id.* at 479.

The additional conduct test best advances these three bedrock principles and therefore supplies the proper rule governing cases that "sink or swim with the stream-of-commerce theory of jurisdiction."

See Asahi, 480 U.S. at 112 (plurality opinion) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*") (quoting *Burger King*, 47 1 U.S. at 475; *McGee*, 335 U.S. at 223).

First, that approach more faithfully ensures that only the *defendant's* contacts guide the constitutional analysis. By requiring "additional conduct" such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," *Asahi*, 480 U.S. at 112, that approach focuses a court's attention on the defendant's *own* activity. By contrast, Justice Brennan's approach attributes the conduct of other entities to the defendant. For example, in *Asahi*, under Justice Brennan's approach, Cheng Shin's sales of the finished tire tubes to California would be attributed to Asahi even though Asahi, once it sold the tire valve assemblies to Cheng Shin, had no control over where the tire tubes ultimately would be sold. That "jurisdiction by attribution" approach flouts the principle from cases such as *Rush* and *Keeton* under which "the requirements of *International Shoe* . . . . must be met as to each defendant over whom a state court exercises jurisdiction." Such an approach "destroys the notion of individual sovereignties inherent in our federal system" and "would subject defendants to judgments in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and

risks." *Lesnick v. Hollingsowrth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). If jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary, it follows logically that jurisdiction over a company with an even more remote connection to the defendant (such as a purchaser of component parts, as in *Asahi*, or a distributor) likewise cannot automatically establish jurisdiction over the non-resident company.

Second, the additional conduct test more faithfully ensures that only the defendant's contacts *with the forum* count in the constitutional analysis. Each example of the "additional conduct" identified by the plurality opinion requires some activity directed at the forum state specifically. For example, the product must be designed "for the market in the forum state" or the advertising must occur "in the forum state." By contrast, Justice Brennan's approach credits contacts with other forums. The lower court's opinion in this case illustrates the perils. All Petitioner is alleged to have done in this case is to sell a piece of equipment to its distributor. Yet because the distributor covered a nationwide market, the court seized upon this sale in Ohio to manufacture the contacts between the Petitioner and New Jersey. Pet. App. 37a. That stretching of the relevant forum flouts the principle from *Kulko* and *Woodson*. These are precisely the sort of "financial benefits accruing . . . from a *collateral relation* to the forum state" and "do not stem from a constitutionally cognizable contact with that State."

Third, the additional conduct test more faithfully ensures that the defendant's contacts with the forum state satisfy the purposeful availment requirement that is "essential in every case." *See Asahi*, 480 U.S.

at 112 ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."). That approach recognizes that the role of additional conduct is to "indicate an intent or purpose to serve the market in the forum state." 480 U.S. at 102. *See also Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989) (opinion of Judge Brown joined by Judges Breyer and Bownes) ("[I]n the so-called 'stream of commerce' cases, courts must focus on the acts of the non-resident defendant to see if the defendant has a 'substantial connection' with the forum State to support an assertion of personal jurisdiction.") (citations omitted). By contrast, Justice Brennan's approach, focusing purely on knowledge or foreseeability, fails to require the necessary indicia of an "intent or purpose to serve the market in the forum state." This relaxed approach flouts the principle from *Burger King*. If a contract with a resident of the forum state, standing alone, does not establish that the defendant "purposefully established minimum contacts," it logically follows that the delivery of a good pursuant to *another* contract with *another* party in *another* state likewise cannot, standing alone, satisfy this constitutional requirement. Additional conduct, just like "additional indicia," as *Burger King* held, is necessary.

In sum, the additional conduct test in *Asahi* most faithfully advances three principles that have unified this Court's jurisprudence regarding the constitutional limits on state court assertions of judicial jurisdiction—(1) defendant's contacts (2) with the forum state that (3) rise to the level of purposeful availment. Thus, as several lower courts have recognized, this approach "is most consistent with the Court's earlier pronouncements" and represents the

better approach to cases that depend on the stream-of-commerce theory. *CSR, Ltd. v. Taylor*, 983 A.2d 492, 507 (Md. 2009).

B. The Lower Court's Stream-of-Commerce Test Has Deleterious Consequences For American Business.

Apart from its incompatibility with bedrock principles of this Court's Due Process jurisprudence, the lower court's "entirely new and unbounded" test has deleterious consequences for the American economy and American business. Pet. App. 45a (dissenting opinion). Here, *amicus* stresses three such consequences: (1) a crippling effect on commerce, (2) damage to small businesses, especially those that produce component parts, and (3) expensive and time-consuming jurisdictional discovery

First, a more relaxed stream-of-commerce test has a crippling effect on commerce. Under the lower court's rule, a company whose products enter the stream of commerce can only avoid judicial jurisdiction of foreign forums by showing that it took affirmative steps to preclude the entry of its product into a forum state. Pet. App. 38a. That holding parallels a similar holding by the North Carolina Court of Appeals in *Goodyear Luxembourg Tires, S.A. et al. v. Brown et al.* (No. 10-76). As *amicus* explains in its brief in that case, this rule discourages both foreign and interstate commercial activity. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners in *Goodyear Luxembourg Tires, S.A. et al. v. Brown et al.* (No. 10-76). In doing so, as Justice Rivera-Soto correctly recognized in dissent in this case, it "offends those core federalist concepts that rightly and prudentially limit the exercise of any one state's judicial

power via the invocation of long-arm jurisdiction." Pet. App. 72a.

Second, a more relaxed stream-of-commerce test has a particularly damaging effect on small businesses, which comprise a core constituency of *amicus'* membership. Whatever rule the Court announces will have implications not simply for cases such as this one (involving a forum state plaintiff and a foreign manufacturer) but also for purely domestic cases (such as one involving a small business located in one state and a plaintiff located in another). In this latter setting, the lower court's rule is especially troubling. For example, small businesses often supply component parts to larger manufacturers (much like the relationship between the tire valve company and the tire tube assembler in *Asahi*). *See, e.g.*, *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 84-85 (1st Cir. 1997); *Adell Corp. v. Elco Textron, Inc.*, 51 F. Supp. 2d 752 (N.D. Tex. 1999). In those relationships, the component parts manufacturer does not control where the manufacturer of finished goods markets the products and cannot insist that this manufacturer limit its sale of goods containing the component parts to certain markets. *Cf. Rush*, 444 U.S. at 329 (noting that defendant "had no control over [its insurer's] decision" to do business in forum state). Similarly, small business may try to sell their goods to a retailer with nationwide outlets. *See, e.g.*, *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Jones v. Boto Co., Ltd.*, 498 F. Supp. 2d 822 (E.D. Va. 2007); *Abel v. Montgomery Ward Co.*, 798 F. Supp. 322 (E.D. Va. 1992). As with the component parts case, small business owners have little control over the retailers' choices about where to market the goods. *See, e.g., Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 475 (5th Cir. 2006) (Demoss, J.,

specially concurring). In these sorts of cases, the lower court's rule presents the small business with an intractable dilemma—continue to sell its goods to the manufacturer or retailer (thereby risking a financially burdensome lawsuit in a faraway forum) *or* terminate the relationship entirely (thereby cutting off an important source of business and decreasing competition in the market).

Third, the lower court's test promises to bog down parties and the courts in expensive and time-consuming jurisdictional discovery. As this Court just recently observed in the context of determining a corporation's principal place of business:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.

Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) (citations omitted). The lower court's emphasis on a company's "knowledge" and the steps that it took (or didn't take) to preclude the flow of its products into a forum entail just the sort of complexity that the unanimous Court in *Hertz* wanted to avoid. As the New Hampshire Supreme Court concluded in its opinion adopting the additional conduct test:

> Actual knowledge, especially when dealing with a commercial setting, may be difficult to determine. It may not be obvious whose knowledge—which corporate officer's—is determinative. Also

> important evidence may be located in distant jurisdictions, and, therefore difficult to obtain.

Vermont Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., Inc., 914 A.2d 818, 827 (N.H. 2006).

Plaintiffs will exploit the "difficult[ies]" of such concepts through the strategic use of jurisdictional discovery. Though this Court has not extensively addressed jurisdictional discovery (except in the context of upholding a sanction, *see Insurance Co. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694 (1982)), such tactics are an unfortunate reality in many cases where a non-resident company challenges personal jurisdiction. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489 (2010). Just like merits discovery, jurisdictional discovery can be "expensive." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Moreover, jurisdictional discovery, unlike merits discovery, is directed entirely at the defendant, so it represents an especially powerful weapon in a plaintiff's arsenal for piling on costs and can "push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559. Not only do these tactics compound the defendants' costs, they also expend "judicial resources." *Hertz*, 130 S. Ct. at 1193. The underlying suit in this case was filed over seven years ago and has bounced up and down the New Jersey court system over disputes about jurisdictional discovery and the proper jurisdictional test. *See* Pet. App. 3a-10a. Such a state of affairs, which the lower court's rule is bound to reproduce, serves neither the parties nor the judicial system.

C. Carefully Crafted Federal Legislation, Not an Evisceration of the Due Process Clause, Might Address Any Concerns Over Assuring The Availability Of A Forum For Resident Plaintiffs Injured By Foreign Defendants.

The court below justified the more relaxed rule on the grounds that "[t]he power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy." Pet. App. 14a. This notion that the constraints of the Due Process Clause must evolve with commerce traces to the following passage from this Court's opinion in *McGee*:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign governments and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With the increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

355 U.S. at 222-23.

While our national economy certainly has undergone a "fundamental transformation" since the Fourteenth Amendment's adoption, "it is a mistake to

assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson*, 357 U.S. at 251. "The economic interdependence of the States was foreseen by the Framers," so the increased interconnectedness does not justify a dilution of the "principles of interstate federalism embodied in the Constitution." *Woodson*, 444 U.S. at 293. Indeed, if anything, the increased interconnectedness of our economy enhances the risk of interstate or international commercial conflict and, thus, heightens the need for clear limits on state adjudicatory authority.

Those limits may, of course, result in certain cases where a citizen of the forum state is injured in the forum state by an overseas manufacturer's product and yet not have an American forum in which to sue the manufacturer. (Such a risk, of course, does not exist with respect to domestic manufacturers which historically have been amenable to suit in the state of their incorporation. *See, e.g., St. Clair v. Cox*, 106 U.S. 350, 353 (1882).) Yet the solution to this "gap" in judicial jurisdiction over foreign manufacturers is not to rewrite the "restrictions on the personal jurisdiction of state courts." Instead, the proper remedy is for Congress to fill the gap through the adoption of federal legislation, as it has done in other contexts. *See Omni Capital Int'l Ltd. v. Rudolf Wolff Co. Ltd.*, 484 U.S. 97, 105 (1987).

Specifically, the solution to this above-described "gap" is for Congress to "authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts . . ." *Asahi*, 480 U.S. at 113 n.* (plurality opinion). (Subject-matter jurisdiction in such cases already exists pursuant to the alienage provisions of the federal diversity statute.

See 28 U.S.C. §1332(a)(2)-(3); U.S. Const. Art. III, §2.) On several occasions, Congress has authorized federal courts to exercise personal jurisdiction over foreign defendants on the basis of their nationwide contacts. *See* Fed. R. Civ. P. 4(k)(1))(d), 4(k)(2). For example, Federal Rule of Civil Procedure 4(k)(2) authorizes federal courts to exercise personal jurisdiction in federal question cases "over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."

This solution rests on critical differences between the constitutional limits on the assertion of judicial jurisdiction in the Fourteenth Amendment and those in the Fifth Amendment. The Fourteenth Amendment sets the constitutional boundaries for assertions of jurisdiction by state courts. In those cases, the "forum" for purposes of the Due Process Clause, as noted above, is the individual state. By contrast, the Fifth Amendment sets the constitutional boundaries for assertions of jurisdiction by United States Courts. In those cases, the "forum" for purposes of the Due Process Clause is the United States as a whole. In recognition of this difference, numerous federal courts have upheld assertions of personal jurisdiction based on a foreign defendant's nationwide contacts in cases where a federal statute or federal rule has explicitly authorized such an assertion of jurisdiction. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 194-95, 199-200, 215-16 (Aspen 2006).

In recent years, Congress has considered various proposals to address this gap in judicial jurisdiction over foreign companies, *see, e.g.,* S.1606, *The Foreign Manufacturers Liability Act of 2009*, though *amicus* has not endorsed any specific proposal. Conceivably,

Congress might authorize *federal courts* (though not state courts) to exercise personal jurisdiction over foreign companies on the basis of their nationwide contacts. *See* Testimony of Victor E. Schwartz on behalf of the U.S. Chamber of Commerce, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, Hearing on "Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable," 111th Cong., 1st sess. (May 19, 2009). To limit the law's sweep, Congress might confine this authorization to instances in which the defendant "is not subject to jurisdiction in any state's courts of general jurisdiction" as it did with Rule 4(k)(2). Any option, of course, requires Congress to balance competing considerations ultimately affecting the nation's foreign economic policy, and it certainly is not necessary for this Court to provide Congress a blueprint on how to strike that balance, just as it declined to do so in *Omni Capital*. · Nor would it be appropriate for this Court to offer an "advisory opinion" on the constitutionality of a particular approach. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). Rather, this Court could invite Congress to fill the gap and, then, reserve judgment on the ultimate constitutional question.

At bottom, then, any concerns about a resident plaintiff lacking a forum for a suit against a foreign company do not justify watering down important constitutional restrictions on the assertion of state judicial jurisdiction, restrictions that protect foreign and domestic companies. Rather, as is often the case, Congress has before it an alternative path—and the Court should allow the legislative process to run its course.

D. The Court Should Use This Case To Explicate Two Features Of The "Additional Conduct" Test.

While *amicus* endorses the additional conduct test, it respectfully urges this Court to use this case as an opportunity to elaborate on two aspects that are especially important to the business community.

1. The Court should eliminate any confusion over the differences between agency and distributor relationships.

First, the Court should make clear that not all networks for the distribution of a company's product satisfy the "additional conduct" requirement. In *Asahi*, the plurality described the relevant additional conduct to include "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." 480 U.S. at 112. *Amicus* respectfully submits that this quoted language could be read to collapse the difference between "distributors" and "agents."

Agency relationships and distribution relationships represent radically different business models. *See* Ralph H. Folsom *et al.*, *International Business Transactions* 127-54 (West 2d ed. 2001). In a simple agency relationship, the company retains the services of one or more individuals (or companies) which are responsible for generating sales of products within a particular region. Agents often work on commission and never take title to the goods. Rather, they arrange direct sales between the company and the ultimate customer. Both risk and title pass directly from the seller to the customer.

Distribution arrangements stand on a very different footing. In a simple distribution relationship, the seller enters into an arms-length contractual relationship with the distributor. The distribution relationship typically covers a defined geographic area and may be exclusive or non-exclusive. The authorized distribution may carry the products of several companies. Unlike agents, distributors do not work on commission but, instead, purchase the products outright from the seller and then sell those products onto the customer. In contrast to an agency relationship, title and risk typically pass from the seller *to the distributor*. When the distributor sells the product to a customer, it is the distributor who passes title and risk to that customer.

These differences can bear on the "additional conduct" analysis. Where the company employs sales agents within the forum state, it is likelier that the company has purposefully directed its actions toward the forum state. That was the central lesson from *International Shoe* where the company employed sales agents who worked directly in the State of Washington and arranged sales between Washington customers and the non-resident corporation. 326 U.S. at 313. By contrast, as the dissenting judges in the opinion below recognized, where the company enters into an arms-length distribution arrangement, the seller has not directed its actions toward all the states within the distributor's network. Pet. App. 60a-62a. That was a central lesson from *Woodson* where the manufacturer (Audi), the importer (Volkswagen of America), the regional distributor (World-Wide) and the retail dealer (Seaway) stood in an arms-length relationship. Although the manufacturer in *Woodson* did not challenge personal jurisdiction, the Court made clear that each entity would be subject to a

separate jurisdictional analysis. *See* 444 U.S. at 297-98 (explaining how if the "manufacturer *or* distributor" targets the forum state it is not "unreasonable to subject *it* to suit" in that state for defective merchandise causing injury there) (emphasis added). To hold otherwise would impute the distributor's conduct to the seller and run contrary to this Court's instruction that "[e]ach defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n. 13.

While it may be objected that this distinction provides companies a roadmap for how to structure their operations in order to avoid judicial jurisdiction, that complaint is both inaccurate and ignores one of the central purposes of the Due Process constraints on state courts' exercise of judicial jurisdiction. The complaint is inaccurate because a plaintiff wishing to sue the upstream manufacturer may have remedies in other forums. Moreover, a central purpose of the Due Process Clause is to provide potential defendants some predictability about the conduct that will subject them to jurisdiction and, thereby, allow them to structure their primary conduct. *Woodson*, 444 U.S. at 297. Making clear that not all networks for the distribution of a company's product satisfy the "additional conduct" requirement provides some essential predictability.

2. The Court should reduce uncertainty over whether internet advertising constitutes "advertising in the forum state."

Second, the Court should make clear that certain forms of internet advertising do not satisfy the "additional conduct" requirement. In *Asahi*, the plurality described the relevant additional conduct to

include "advertising in the forum state." 480 U.S. at 112. Apart from requiring that the advertising occur "in the forum state," *Asahi* did not illuminate the forms of advertising that would suffice, but obviously in 1987 the use of the internet for commercial purposes practically did not exist.

In the intervening twenty-three years, the internet has "experienced extraordinary growth" and become an important advertising medium. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997). Its use affects every sector of the economy and businesses of all sizes. It is especially important to small businesses, a core component of the Chamber's membership, by providing an especially cost-effective means (compared with traditional media) to communicate with a wide array of customers.

The increased use of this advertising medium has spawned a litany of decisions that attempt to map general principles of personal jurisdiction onto this revolutionary technology *See generally* Richard E. Kaye, *Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long-Arm Statutes and Due Process Clause,* 81 A.L.R.5th 41 (2010) (collecting cases). Some courts have held that a defendant who maintains a webpage is subject to personal jurisdiction in any state where that web page may be accessed. *Id.* This position threatens to obliterate any meaningful constitutional limits on personal jurisdiction for businesses that rely on the internet. By contrast, other courts sensibly have required something more than a mere presence on the internet in order to find that the defendant has "advertis[ed] in the forum state." *Id.*

This case obviously does not involve internet advertising and therefore does not require the Court

to decide definitively what array of Internet activities satisfy the "purposeful availment" requirement of the Due Process Clause. Nonetheless, assuming that this Court adopts some form of the "additional conduct" test, the case does provide an appropriate vehicle to gloss the meaning of "advertising in the forum state" in light of the rapid technological changes that have occurred over the last decades. Specifically, in order to provide a "degree of predictability" to companies, the Court should make clear that, at a minimum, the mere presence on the internet does not constitute "advertising in the forum state." Otherwise, the website will become the company's "agent for service of process" and would make the company "amenab[le] to suit" wherever the website could be accessed, thereby obliterating any limits on judicial jurisdiction. *Woodson*, 444 U.S. at 296.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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J. McINTYRE MACHINERY LTD.,
Petitioner,

v.

ROBERT NICASTRO, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* DOW CHEMICAL CANADA ULC IN SUPPORT OF PETITIONER ON THE MERITS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Dow Chemical Canada ULC (Dow Canada) addresses the question, left open in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-13, 116-21 (1987), of whether placing products into the stream of commerce in a foreign country (or another State), aware that some may or will be swept into the forum State, is enough to subject a defendant to personal jurisdiction—or whether, as shown below, due process requires that the defendant have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within the forum State. Dow Canada urges reversal of the New Jersey Supreme Court's decision below because it relied on the foreign defendant's contacts solely with the stream of commerce—not contacts with the forum—to assert personal jurisdiction over petitioner J. McIntyre Machinery Ltd. *See* pet. app. 13a, 31a-32a.

Dow Canada has faced this issue repeatedly and has been subjected to inconsistent decisions. Dow Canada is a Canadian corporation; it operates, has

[1] This brief is submitted pursuant to the general consent of each party to the filing of amicus briefs. The Clerk received consents from respondents and petitioner, respectively, on October 13 and 15, 2010. This brief has not been authored, in whole or in part, by counsel for a party in this case (No 09-1343). No monetary contribution intended to fund the preparation or submission of this brief has been made by any person or entity other than Dow Chemical Canada ULC or its counsel.

its headquarters, and employs people in Canada. It has been sued in product liability actions in various American state and federal courts over component parts that its predecessor supplied exclusively in Canada. Dow Canada's predecessor did not market or ship those components into any of the States. Rather, an unrelated Canadian manufacturer purchased the components pursuant to arms-length transactions under Québec law and then incorporated them into finished products that it distributed for sale in the United States and elsewhere.

The inconsistent rulings in these cases illustrate the arbitrary assertion of jurisdiction and the need for resolution by this Court. Dow Canada has been dismissed from a number of these cases, but several state courts have asserted personal jurisdiction over Dow Canada because of its predecessor's contact with the stream of commerce in Canada—despite the absence of contact with a forum State.

Dow Canada has presented the stream-of-commerce question in its pending petition for a writ of certiorari in *Dow Chemical Canada ULC v. Fandino*, No. 10-250. That case arises from an action pending in the Superior Court of California for the County of Los Angeles. There, the California court has asserted personal jurisdiction over Dow Canada based solely on a finding that its predecessor component supplier was told by the Canadian finished-product manufacturer that finished products incorporating the components would be sold in the United States, including California. Pet. (No. 10-250), app. C at 5a-6a.

Thus, jurisdiction has been imposed simply because the foreign supplier placed component parts in the stream of commerce in a foreign country with awareness that some would end up in the forum State as part of finished products—even though the supplier did nothing to get them there. Under the stream-of-commerce test proposed by Justice Brennan (joined by three other justices) in *Asahi*, 480 U.S. at 116-21, the California court's finding would meet the minimum-contacts threshold for personal jurisdiction. But as Justice O'Connor (joined by three other justices) explained in *Asahi*, *id.* at 108-13 (Part II-A, the stream-of-commerce-plus approach), the Due Process Clause requires more than mere placement of products into the stream of commerce, with awareness that some may or will be swept into the forum State.

Besides Dow Canada's specific interest in vindicating its due process rights in that particular litigation, Dow Canada has the interest it shares with other foreign businesses generally in seeking protection against the unconstitutional (and arbitrary) assertion of personal jurisdiction by state and federal courts in the United States.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

SUMMARY OF ARGUMENT

The "stream-of-commerce" test being used by a number of lower courts departs from basic due process requirements for the assertion of personal jurisdiction. It does not require an act by the nonresident defendant directed at the forum State, and it does not even require the nonresident defendant's intent directed at the forum State. Instead, it subjects a defendant to personal jurisdiction for placing a product into the stream of commerce—anywhere in the world—if the defendant is made aware that the product may or will be swept into the forum State. This Court has never upheld jurisdiction based solely on such conduct.

Stream-of-commerce jurisdiction substitutes a defendant's contact with the stream of commerce anywhere in the world—for contact with the forum State. Ignoring this Court's holdings to the contrary, it subjects a foreign defendant to personal jurisdiction based not on its own conduct directed at the forum State, but on the unilateral acts of others. We illustrate this with Dow Canada's case involving the supply of component parts, exclusively in a foreign country, with no control over where the purchaser's ultimate finished products were sold.

The "awareness" ostensibly required for stream-of-commerce jurisdiction is susceptible to manipulation and subjects foreign businesses to arbitrary assertions of personal jurisdiction. To satisfy due process, personal jurisdiction must be

predicated on a foreign defendant's verifiable conduct directed at the forum.

Stream-of-commerce jurisdiction improperly burdens foreign businesses that engage in commercial transactions exclusively in foreign countries, effectively subjecting them to suit in any State and the governance of their foreign transactions according to the product-liability laws of 50 different States. The assertion by some States that foreign businesses must take affirmative steps to avoid jurisdiction in American courts imposes a further improper burden on foreign commerce.

In addition, we address the specific point that the foreign manufacture of a product in conformity with U.S. safety standards is not a basis to assert personal jurisdiction over the foreign manufacturer.

ARGUMENT

I. For Personal Jurisdiction, Due Process Requires the Act and the Intent of the Foreign Defendant Directed at the Forum State

This Court has long recognized that "[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,

413-14 (1984); *accord Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("The Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations,' " quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) ("[s]ince the adoption of the Fourteenth Amendment," judgment by court lacking jurisdiction over parties does "not constitute due process of law").[2]

This Court has long required "minimum contacts" between the defendant and the forum State as the starting threshold essential to personal jurisdiction. *International Shoe*, 326 U.S. at 316-17 (holding that due process requires that defendant from outside the forum State "have

[2] "The proposition that the judgment of a court lacking jurisdiction is void" was established in English common law long before the Founding. *See Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (Scalia, J., joined by three other justices)

In a broader sense, the Declaration of Independence decried a government's assertion of authority over those not properly subject to its jurisdiction. Regarding Parliament's assertions of legislative authority over American colonies, the Declaration objected that King George III "has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; . . ."

As for the United States, the Declaration did not announce America's intent to impose its will on the world; rather, it claimed an "equal station" "among the powers of the earth," and it voiced this with "a decent respect to the opinions of mankind . . ."

certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' "—"such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, . . . "); *World-Wide Volkswagen*, 444 U.S. at 291 ("a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State").[3]

The "minimum contacts" requirement reflects two essential constraints on the exercise of personal jurisdiction over nonresidents—fairness to nonresident defendants and limits of state power. *World-Wide Volkswagen*, 444 U.S. at 291-92 ("The concept of minimum contacts .... protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

Even in interstate disputes, this Court has repeatedly cautioned that while technological progress has increased the flow of commerce between the States and lessened the burden of defending in another State, the necessity of the

[3] In *Asahi*, 480 U.S. at 113-16, this Court discussed the additional due process requirement that the assertion of personal jurisdiction over a foreign defendant be fair and reasonable, considering private and public interests.

defendant's connection with the forum still inheres in limitations on state power. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) ("[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he [or she] has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him [or her]."); *accord World-Wide Volkswagen*, 444 U.S. at 294.

And the convenience of a forum for a plaintiff, its relative convenience for the defendant, or its close connection with the underlying action cannot offset a defendant's lack of requisite contact with the forum. *World-Wide Volkswagen*, 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); *Shaffer v. Heitner*, 433 U.S. at 215 ("even if . . . the importance of [the forum State's] interest is accepted, . . . we have rejected the argument that if a State's law can properly be applied to a dispute,

its courts necessarily have jurisdiction over the parties to that dispute."); *Hanson v. Denckla*, 357 U.S. at 254 ("[A state] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [defendant].").

Critically, to find the requisite minimum contacts, the out-of-state defendant—not some third party—must, by its own actions, have purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

> The unilateral activity of those who claim some relationship with a nonresident defendant *cannot* satisfy the requirement of *contact* with the forum State. . . . [I]t is essential in each case that there be some *act* by which the *defendant* purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. at 253 (emphases added); *Asahi*, 480 U.S. at 109 (O'Connor, J., joined by three other justices); *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474-475 ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result . . . of the 'unilateral activity of another

party or a third person' "); *World-Wide Volkswagen*, 444 U.S. at 297-98; *Kulko v. Superior Court of California*, 436 U.S. 84, 93-94 (1978). *Compare Shaffer v. Heitner*, 433 U.S. at 213 (finding no minimum contacts where the plaintiff "did not allege and does not now claim that [the defendants] have ever set foot in [the forum State]. Nor does he identify any *act* related to his cause of action as having taken place in [the forum State]." (emphasis added)) *and Helicopteros*, 466 U.S. at 417 ("unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State") *with Burger King*, 471 U.S. at 479-82 (upholding jurisdiction in Florida under Due Process Clause where defendant had "deliberately" reached out and "negotiated with a Florida corporation for the purchase of a long-term franchise" with "exacting regulation of his business from Burger King's Miami headquarters" and "documents providing that all disputes would be governed by Florida law"; finding that defendant " 'purposefully availed himself of the benefits and protections of Florida's law' ").

Thus, the "minimum contacts" test requires (1) an act ("availment") and (2) intent ("purposeful"). And it requires the act and the intent *of the defendant* directed specifically at the forum State.

II. Jurisdiction Based on Contact with the Stream of Commerce Alone Lacks the Due Process Requirements of the Act and the Intent of the Foreign Defendant Directed at the Forum State

The assertion of jurisdiction based solely on contacts with the stream of commerce outside the forum—under the so-called "stream-of-commerce" test—would collapse and ultimately obliterate the two-pronged requirement of an act and intent of the defendant directed at the forum. The test asserts that a foreign defendant has "minimum contacts" with the forum State based simply on placing products into the stream of commerce in a foreign country (or another State) with awareness that some such products may or will be swept into the forum State. *See Asahi*, 480 U.S. at 116-21 (opinion of Brennan, J., joined by three other justices). This Court has never upheld jurisdiction based solely on such conduct.[4] Stream-of-commerce jurisdiction violates due process because it does not require both (1) an act and (2) an intent *of the defendant* directed specifically at the forum State.

[4] On the other hand, the Court has acknowledged minimum contacts in circumstances that would satisfy the competing stream-of-commerce-plus test. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 302, 307-08 (1992) (citing personal jurisdiction cases; finding that nonresident mail-order house that "engaged in continuous and widespread solicitation of business within a State," and shipped its merchandise to purchasers in the State, had minimum contacts satisfying due process threshold for use tax); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (finding that principal defendant's regular circulation of magazines in the forum State was sufficient to support jurisdiction).

First, this stream-of-commerce jurisdiction does not require an *act* by the foreign defendant directed at the forum State. It collapses "purposeful availment" to just "purposeful." Placing a product into the stream of commerce—anywhere in the world *but* the forum—is deemed to suffice for the foreign defendant's conduct. The defendant is subjected to jurisdiction as a result of the unilateral act of another who actually distributes the product into the forum State—notwithstanding this Court's well-established jurisprudence to the contrary. *E.g.*, *Helicopteros*, 466 U.S. at 417; *World-Wide Volkswagen*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. at 253.

This is illustrated by Dow Canada's case. Dow Canada's predecessor (like Dow Canada, a Canadian corporation) supplied certain gas tanks exclusively in Canada to Bombardier Inc., an independent Canadian manufacturer that used the gas tanks in making Sea-Doo personal watercraft. Pet. (No. 10-250) at 5. Thereafter, Bombardier elected to distribute some of its Sea-Doo personal watercraft for sale in the United States, including California. *Id.* at 5-7. As a component-part supplier, Dow Canada's predecessor had no control over where Bombardier chose to sell its finished products. The California courts nevertheless asserted personal jurisdiction over Dow Canada, even though Dow Canada's predecessor never marketed or shipped its components to California. *Id.* at 7-9.

Second, the stream-of-commerce test obliterates the "purposeful availment" standard because it

does not even require the *intent* of the foreign defendant directed at the forum State. Instead, it permits jurisdiction based on the defendant's simple knowledge or awareness that its products may or will be carried through the stream of commerce to the forum State. Simply being informed about the downstream activities of others directed to the forum State is deemed sufficient to subject the defendant to personal jurisdiction in the forum. Thus, the requirement established by this Court—that "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"—is being replaced by a "passive listening" test.[5]

[5] The requirement of an act and an intent of the defendant was not displaced by a mere awareness test in *World-Wide Volkswagen*. In dicta, the opinion indicated that a State could assert personal jurisdiction "over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 297-98. A proper construction of this reference to a defendant's "expectation," however, must recognize the material distinction between the prescriptive and the descriptive meanings of "expectation." "Expectation" in the descriptive sense—as in awareness or foreseeability of what will happen—is not a sufficient basis for jurisdiction. Indeed, the Court stated that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause " *Id.* at 295. "Expectation" in the prescriptive sense, however, where a defendant exercises control and directs the sale of its products in the forum State—e.g., selling products to consumers and distributors inside the forum State—constitutes purposeful availment In

(*continued on next page*)

This, too, is illustrated by Dow Canada's case. The California courts based jurisdiction solely on the declaration of a Bombardier employee that, sometime in "the early 1990s," he told unidentified "representatives" of Dow Canada's predecessor corporation that Bombardier personal watercraft, which incorporated the component gas tanks, would be sold across the United States, including California. Pet. (No. 10-250) at 7.

Again, this stream-of-commerce test impermissibly imposes personal jurisdiction on the foreign defendant based on the unilateral conduct of others. When a third party downstream takes the defendant's products and sends them to the forum State, and in some manner informs the defendant that this is happening, it is still the conduct of the third party—not the foreign defendant—for which the stream-of-commerce test subjects the foreign defendant to jurisdiction.

Subjecting a foreign defendant to personal jurisdiction based on the "unilateral activity of those who claim some relationship with a nonresident defendant" is contrary to this Court's established jurisprudence. *E.g.*, *Burger King*, 471 U.S. at 474-475; *Helicopteros*, 466 U.S. at 417; *Hanson v. Denckla*, 357 U.S. at 253. To hold a foreign defendant subject to personal jurisdiction based on the unilateral conduct of another offends

World-Wide Volkswagen, the Court focused on whether "*the defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297 (emphasis added).

"traditional notions of fair play and substantial justice."[6]

III. Stream-of-Commerce Jurisdiction Also Improperly Burdens Foreign Commerce and Impairs the Orderly Administration of the Laws

Ultimately, the stream-of-commerce test would generate tentacles for state courts to assert jurisdiction over foreign businesses in the distant reaches of the world. The countless rivulets of the international stream of commerce may be found far and wide. For anyone transacting business in a foreign country, there exists the inevitable possibility that products might make their way into the international market and into the United

[6] We also note that a foreign corporation is not subject to personal jurisdiction by virtue of being a subsidiary of a corporation headquartered in the United States. *See Keeton*, 465 U.S. at 781, n.13 (requiring that forum contacts of parent corporation and of wholly-owned subsidiary be assessed individually). Considering each corporate entity separately for personal-jurisdiction analysis comports with the rights that each entity holds as a "person" protected by the Due Process Clause. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881, n.9 (1985) (corporation protected as "person" under Fourteenth Amendment); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (same).

In the case of Dow Canada, its status as a foreign company not subject to jurisdiction in California is undiminished by its status as an indirect subsidiary of a corporation headquartered in the United States. Dow Canada is a Canadian company; it operates, has its headquarters, and employs people in Canada. Thus, Dow Canada is a Canadian concern.

States, especially given the collective purchasing power of the American market.

The "awareness" requirement of the stream-of-commerce test is no bulwark to defend due process. It is prone to sweeping generalities about "where" a defendant's products might be swept by the stream of commerce. In the instant case, for example, the New Jersey Supreme Court concluded that a defendant's awareness that its products are being sold to the United States generally equates to jurisdiction in New Jersey—and presumably each and every other State.[7]

The "awareness" requirement is also susceptible to being stretched to include "constructive awareness." Given the theoretical potential to surmise the scope of possible markets where products may be sold, enhanced by the potential to explore this by limitless efforts searching the worldwide web (should one choose to do so), the stream-of-commerce test would invite courts to find "awareness" in virtually any circumstance that a product lands in the forum. Courts unconstrained by a firm jurisdictional threshold have a tendency

[7] Implicitly recognizing that States lack the authority to arrogate such jurisdictional power to themselves, Justice O'Connor noted in *Asahi* that the Court had "no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits." *Asahi*, 480 U.S. at 112, n * (O'Connor, J., joined by three other justices) (emphasis in original).

to be aggressive in asserting personal jurisdiction on behalf of their resident plaintiffs. *See, e.g., W. Virginia ex rel CSR, Ltd. v. MacQueen*, 441 S.E.2d 658, 660 (W. Va. 1994) (expressing concern at the possibility that if West Virginia "declined jurisdiction, Mississippi plaintiffs will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs").

The "awareness" requirement is susceptible to arbitrary application and manipulation in other respects. The test does not turn on the concrete, verifiable act of the defendant in shipping products into the forum, but on vagaries of proof as to what that defendant might have been thinking (or what some unspecified employee might have been thinking). Thus, the test tempts cross-complaining co-defendants, for example, to make disingenuous claims of having told the subject defendant that its products would eventually be distributed into the forum. On the other hand, the test invites ready denials by the subject defendant that it ever received such information—denials that could be correct, or that could be disingenuous, or that could be made erroneously but in good faith, depending on how the information was processed (if at all) by the person in the defendant's organization who supposedly received it.

Because the stream-of-commerce test is easily subject to arbitrary application, it does not comport with this Court's declaration that "the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws,' . . . ." *World-*

Wide Volkswagen, 444 U.S. at 294 (quoting *International Shoe*, 326 U.S. at 319).

With its "awareness" requirement, the stream-of-commerce test generates even more complications for foreign businesses by inviting them to follow the suggestion of several lower courts—including the Supreme Court of New Jersey here—to instruct foreign purchasers not to distribute their products to specified States. *See* pet. app. at 36a (*Nicastro v. McIntyre Machinery Am., Inc.*, 987 A.2d 575, 591 (N.J. 2010)) ("A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State."); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1363 n.8 (Ariz. 1995) (noting that defendant could have avoided personal jurisdiction in Arizona by "making some affirmative effort to preclude distribution of its products in our state"). For individual States to prescribe to foreign businesses around the world the disclaimers and instructions that must be given in foreign countries exceeds the bounds of state court jurisdiction.

Such an instruction, "Do not distribute to the State of ," also is susceptible to arbitrary application and manipulation. It could be given disingenuously, with a wink and a nod, or it could appear in fine print where, on the back of an invoice, it would never be read. Litigating the genuineness or effectiveness of such instructions would result in wasteful transaction costs as well as arbitrary results. Query whether each State would establish its own rules (or even forms) for

such provisions, to be followed by foreign businesses for their foreign transactions.

Nor does the United States benefit from policies that in fact encourage foreign businesses to eschew trade with anyone who may do business with United States markets. Any foreign business that so seeks to protect itself from being haled into court in any particular State would most likely endeavor to avoid jurisdiction by directing downstream purchasers not to deliver its products to *any* State.

Absent such concerted efforts to isolate the American market, the stream-of-commerce test forces virtually every foreign business to assume the risks and burdens of defending itself in every American jurisdiction. As a practical matter, every foreign manufacturer—from a bolt maker in Jakarta to a gas-tank maker in Québec—must account for the product-liability policies of 50 different States and assume the risk of being haled into any court in America. The burden of roundtrip airfare to attend a trial might not appear imposing, but the costs of retaining American defense counsel can be staggering to many foreign companies; and the "American rule" that each party bears its own attorney fees means that such expenses are incurred by the foreign defendant, no matter how meritorious its defense.

In sum, stream-of-commerce jurisdiction also improperly burdens foreign commerce and impairs the orderly administration of the laws.

IV. The Foreign Manufacture of a Product in Conformity with U.S. Safety Standards Is Not a Basis to Assert Personal Jurisdiction

In Dow Canada's case, the plaintiffs and co-defendant Bombardier argued that Dow Canada's predecessor "designed" its component for the California market by producing gas tanks that complied with Canadian Coast Guard and U.S. Coast Guard standards, in accordance with Bombardier's design specifications. *See* pet. (No. 10-250) at 7-8, n.5. While the California trial court did not give this argument any probative weight in Dow Canada's case, *id.*, the issue is apt to arise given the prevalence of U.S. and foreign safety standards for a wide array of products.

Meeting U.S. safety standards is not "purposeful availment" directed at any given forum State. For example, with respect to businesses that supply components in foreign commerce, by meeting general U.S. safety standards, a foreign component maker does not direct the component to any forum State. It simply allows a manufacturer who buys the component the subsequent option of selling the finished product in the United States—which remains the unilateral decision of the finished-product manufacturer. Meeting the standard, then, is at most just evidence of foreseeability that the component could end up in one of 50 different States. "Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295.

Nor would making products in conformity with U.S. safety standards meet either of the alternative minimum-contacts tests set forth in *Asahi*. Compliance with U.S. safety standards does not constitute the kind of "additional conduct" that can satisfy due process under the stream-of-commerce-plus test. Justice O'Connor opined in dicta on several possible factors to find such additional conduct, including "designing the product for the market in the forum State, ..." 480 U.S. at 114. But simply meeting a U.S. safety standard is not specifically designing a product for a particular forum State.[8] As noted above, Justice O'Connor

[8] The First Circuit rejected a comparable argument for jurisdiction based on the alleged "design" of a product for the Puerto Rico market. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997). The defendant sold tire-rim components outside the forum to a wheel manufacturer for use with sand-track tires, knowing that the end products would be widely sold *Id.* at 82, 84-85. Applying in substance the stream-of-commerce-plus test, the court held that the defendant was not subject to personal jurisdiction in Puerto Rico. *Id.* at 84-85. The court rejected an argument that the defendant should be deemed to have designed the product for Puerto Rico because it was designed for use in the sand and Puerto Rico has "an island ecosystem containing an abundance of sandy beaches ideal for dune buggies and other sandworthy vehicles." *Id.* at 85 The court found that basing jurisdiction on the design of a product for use in sand—which covers "roughly 18% of the world's land surface"—would offend constitutional limits. *Id.*

An example of designing a product for a particular forum State, on the other hand, might be producing, for inevitable sale in Texas, a toy football helmet that replicates the appearance of the Houston Texans' helmet—and which then becomes the target of a product-liability lawsuit for an injury

(*continued on next page*)

expressly distinguished aggregate national contacts with the United States (which a State may not claim as its basis for jurisdiction) from contacts with a particular forum State. *See* n.7, *supra* (citing *Asahi*, 480 U.S. at 112, n.* (O'Connor, J., joined by three other justices)). Nor did Justice Brennan's opinion in *Asahi* ever suggest that the downstream marketing of a defendant's product to the United States as a whole could serve as the sole basis for jurisdiction in any given forum State. *Cf. Asahi*, 480 U.S. at 116-21.

Further, the interests of the United States are not served by deterring foreign businesses from considering and using U.S. safety standards, by threatening them with personal jurisdiction should they aspire to make products that meet such standards. Again, a foreign company's mere use of a U.S. safety standard is not an act by which the foreign company itself distributes its product to any particular State and thereby "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

occurring in that State. Presumably, such a case would include evidence of distribution arrangements made by the nonresident defendant to have the product sold in that State.

CONCLUSION

Based on the foregoing and the arguments of others before the Court, Dow Canada respectfully requests that the Court hold that the stream-of-commerce test violates due process.

Respectfully submitted,

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Supreme Court of the United States

♦

J. MCINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

♦

On Writ Of Certiorari To The Supreme Court Of New Jersey

♦

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

♦

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors and legal scholars from across the country with expertise in the areas of civil procedure, conflict of laws, and transnational litigation. Amici have an interest in the proper interpretation of the constitutional restrictions on personal jurisdiction and their effect on civil adjudication. Amici believe that this Court's well-established principles confirm that New Jersey courts may permissibly exercise jurisdiction in this case. A list of Amici is set forth in the appendix hereto.

♦

SUMMARY OF ARGUMENT

This Court's fractured decision in *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987), has spurred some uncertainty about whether U.S. courts may constitutionally exercise jurisdiction over foreign manufacturers whose products are sold to U.S. customers and cause injury in the United States. Although *Asahi* divided 4-4 on whether the foreign manufacturer in that case had established minimum contacts with California, both sides of the

[1] Letters from counsel for all parties evidencing their consent to the timely filing of amicus curiae briefs have been filed with the Court. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored any part of this brief, nor did any person or entity other than amici or counsel make a monetary contribution to its preparation.

split endorsed this long-standing consensus: a manufacturer establishes minimum contacts with the forum when it purposefully seeks to serve – directly or indirectly – the market in the forum state and its product thereby causes injury in that state. This Court should reaffirm this principle and conclude that New Jersey courts may properly assert jurisdiction over Petitioner, a British manufacturer of large metal shearing machines.

There is no question that Petitioner purposefully sought to serve and profit from the U.S. market for its products by, among other things: directly engaging a U.S.-based company to be the exclusive distributor for Petitioner's machines in the territory of the United States; touting in its literature that its machines comply with American safety standards; and having its own high-level officials attend dozens of U.S. trade shows in an effort to promote the sales of its machines in the United States. By taking these purposeful steps to reach the entire U.S. market, Petitioner necessarily sought to serve, at least indirectly, the particular states that comprise the United States. The shear machine at issue in this case went directly from the Petitioner, to its U.S. distributor, to the New Jersey business where Mr. Nicastro worked and was injured. Given Petitioner's efforts to reach and profit from the U.S. market as a whole, sales to customers in particular U.S. states are hardly the kind of random, fortuitous, or attenuated contacts that cannot be fairly attributed to the Petitioner.

Contrary to the arguments of Petitioner and its amici, upholding jurisdiction would not permit nationwide jurisdiction based merely on "national contacts" (rather than contacts with the forum state). Nor would upholding jurisdiction invite judges to subjectively assess "what is fair and just" or deprive defendants of "fair warning" that they will be subject to jurisdiction. To refuse jurisdiction on these facts, on the other hand, would embrace a logical impossibility: that a manufacturer can purposefully target the U.S. market generally without also targeting the states that make up the territory of the United States. Moreover, it would immunize such a manufacturer from jurisdiction in *any* U.S. state, despite its deliberate efforts to access the entire U.S. market. This would create an undesirable and unnecessary disparity between a foreign manufacturer's purposeful conduct directed at the U.S. market and the power of U.S. courts to exercise jurisdiction over claims arising from that conduct.

In fact, the exercise of jurisdiction in this case is entirely consistent with this Court's precedent. Its constitutionality is confirmed by the reasoning of both Justice Brennan's and Justice O'Connor's *Asahi* opinions, and by basic jurisdictional principles that have never been called into question since *International Shoe* articulated the minimum-contacts framework 65 years ago. This Court should affirm the decision below.

◆

ARGUMENT

I. A STATE MAY EXERCISE JURISDICTION OVER A MANUFACTURER WHO MAKES EFFORTS TO SERVE – DIRECTLY OR INDIRECTLY – THE MARKET IN THAT STATE AND WHOSE PRODUCT THEREBY CAUSES INJURY IN THAT STATE.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court set aside the idea that a defendant's "presence within the territorial jurisdiction of [the] court" was a necessary prerequisite to the exercise of personal jurisdiction. *Id.* at 316 (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). Rather, "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*

During the 1980s, this Court articulated a two-part framework for validating a state's exercise of personal jurisdiction under the Fourteenth Amendment. First, the defendant must "purposefully establish[ ] 'minimum contacts' in the forum State"; second, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 476 (1985) (quoting

Int'l Shoe, 326 U.S. at 316, 320). These other factors include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (citation and internal quotation marks omitted).

Petitioner challenges jurisdiction exclusively under the first prong of this framework, conceding that "[t]he sole concern is whether J. McIntyre had minimum contacts with New Jersey." Pet. Br. 30. This is no surprise. Where, as here, the injured party sues in the state where the product was delivered to the end-user and where the injury occurred, these "other factors" point strongly in favor of exercising jurisdiction. A state has a strong interest in adjudicating a dispute involving a product that was purchased and used by an in-state business and caused an in-state injury to an in-state plaintiff. *See, e.g.*, *Burger King*, 471 U.S. at 473 ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (internal quotation marks omitted)). Such a state is also likely to be convenient for accessing evidence relevant to the use of the product, the accident itself, and the plaintiff's damages and injuries.

Turning to the minimum-contacts argument that is the sole basis for Petitioner's jurisdictional

challenge, this Court has consistently held that a manufacturer establishes minimum contacts with a state when it seeks to serve the market in that state and its product thereby causes injury in that state. Indeed, this principle has never been questioned by even a single Justice in the six-and-a-half decades since *International Shoe*. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), for example, this Court wrote:

> "[I]f the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."

Id. at 297.[2]

[2] Jurisdiction was denied in *World-Wide Volkswagen* because the defendants had *not* sought to serve, either directly or indirectly, the market for their product in the forum state of Oklahoma. The defendants were a New York car dealership that served solely the New York market and a New York distributor who served the New York market and surrounding areas in two other states. *Id.* at 288-89 The automobile involved in the accident had been sold to a local New York customer, but it found its way to Oklahoma via the *customer's* "unilateral activity," *id.* at 298, not by any effort on the part of the defendants to reach the Oklahoma market with their products. *See also Asahi*, 480 U.S at 109 (O'Connor, J) (noting that *World-Wide Volkswagen* "rejected the assertion that a *consumer's* unilateral act of bringing the defendant's product into the forum State was

(Continued on following page)

This Court's most recent case on this issue, *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987), yielded no majority opinion on whether the defendant in that case had established minimum contacts with the forum. Four Justices led by Justice O'Connor concluded that Asahi had not established minimum contacts with California. *Id.* at 112-113 (O'Connor, J.). Four Justices led by Justice Brennan concluded that Asahi had established minimum contacts with California. *Id.* at 121 (Brennan, J.).[3]

a sufficient constitutional basis for personal jurisdiction over the defendant" (emphasis in original)).

[3] Justice Stevens did not join either Justice O'Connor's or Justice Brennan's opinion on this issue. *Id.* at 121-122 (Stevens, J.). Despite the split on whether Asahi had established minimum contacts with California, this Court found jurisdiction to be improper under the second prong of the test discussed above, due to unique aspects of that case that made jurisdiction inconsistent with "traditional notions of fair play and substantial justice" *regardless* of whether Asahi had established minimum contacts with the forum. *Id.* at 113 (quoting *Int'l Shoe*, 326 U.S. at 316). Petitioner does not and cannot present a similar argument here. *See* Pet. Br. 30 ("The sole concern is whether J. McIntyre had minimum contacts with New Jersey."). As discussed above, the "other factors" relevant to this second prong point strongly in favor of jurisdiction where, as here, the injured party sues in the state where the product was delivered to the end-user and where the injury occurred. *Asahi* was an unusual case in this regard. Although the accident that gave rise to the lawsuit occurred in California, the claims by the injured California plaintiff were settled. *Asahi*, 480 U.S. at 105-06. Thus the lawsuit that reached this Court concerned only an indemnification claim by a Taiwanese company (Cheng Shin) against a Japanese company (Asahi). This Court reasoned that this odd posture undermined the reasonableness of jurisdiction. *See*

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Some courts have read Justice Brennan and Justice O'Connor as endorsing fundamentally different standards for assessing minimum contacts. *See, e.g., Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1547-49 & n.17 (11th Cir. 1993) (distinguishing between a "stream of commerce" analysis and a "stream of commerce plus" analysis). This characterization, however, overlooks their shared recognition of the basic principle that a manufacturer establishes minimum contacts with the forum when it seeks to serve – directly or indirectly – the market in the forum state and its product thereby causes injury in that state. Both Justice O'Connor and Justice Brennan explicitly embraced the passage from *World-Wide Volkswagen* quoted above:

> "[I]f the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there

Asahi, 480 U.S. at 114 ("[T]he interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi . . . Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

> been the source of injury to its owner or to others."

Asahi, 480 U.S. at 110 (O'Connor, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *id.* at 119 (Brennan, J.) (same). While Justice O'Connor stated that "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," she recognized unequivocally that jurisdiction is permissible if the defendant's conduct "indicate[s] an intent or purpose to *serve the market* in the forum State." *Id.* at 112 (O'Connor, J.) (emphasis added).

II. A MANUFACTURER THAT PURPOSEFULLY ENDEAVORS TO SERVE THE U.S. MARKET AS A WHOLE NECESSARILY SERVES, AT LEAST INDIRECTLY, THE MARKET FOR EACH U.S. STATE.

As explained above, this Court has consistently recognized that a manufacturer establishes minimum contacts with a state when it seeks to serve the market in that state and its product thereby causes injury in that state. The plaintiff in this case alleges that he suffered an injury in the forum state that was caused by a product purchased by a customer in the forum state. A New Jersey business purchased the shear machine from Petitioner's exclusive U.S. distributor, and the machine injured that business's

employee in New Jersey.[4] Thus the only potential obstacle to validating jurisdiction is whether Petitioner took purposeful steps to serve – directly or indirectly – the New Jersey market. For the reasons that follow, the answer must be yes.

Although amici will not reiterate here the full factual record (which is set forth in detail in the Respondents' brief and in the opinions below), it is clear that Petitioner purposefully sought to serve and profit from the U.S. market for the large metal shearing machines that it manufactured in Great Britain. Petitioner entered into an agreement with Ohio-based McIntyre America that designated McIntyre America the exclusive distributor for Petitioner's products in the territory of the United States. McIntyre America was not an end-user of Petitioner's machines, but was a conduit for selling Petitioner's already-finished machines to customers in the United States.[5] Petitioner's own literature for the shear

[4] A different analysis might be necessary if the injury was either *suffered* outside the forum or caused by a product that was ultimately sold to a *customer* outside the forum. In that situation, it could be argued that the claim does not "aris[e] out of or relate[ ] to" the defendant's contacts with the forum. *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The companion case for which this Court has also granted certiorari, *Goodyear Dunlop Tires Operations, S.A. v Brown* (No. 10-76), may implicate this latter scenario. This brief takes no position on the propriety of jurisdiction in the *Goodyear* case.

[5] The record reveals that McIntyre America was "America's link" to Petitioner's products. JA 28a Under its arrangement

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machine at issue touts that it conforms to American safety standards.

By taking these purposeful steps to reach the entire U.S. market, Petitioner necessarily sought to serve, at least indirectly, the New Jersey market as well. Sales of Petitioner's shear machines to customers in the particular states that *comprise* the United States were surely a "contemplated future consequence[]" of Petitioner's purposeful conduct. *Burger King*, 471 U.S. at 479. Given Petitioner's efforts to reach and profit from the U.S. market as a whole, sales within that market cannot be deemed "random, fortuitous, or attenuated." *Id.* at 480 (citations omitted).

with Petitioner, Petitioner shipped new machines to McIntyre America with the expectation that they would be sold in the United States, but those machines would remain Petitioner's property until they were paid for in full JA 134a. As Petitioner's own officers described it, the arrangement was designed to "sell [Petitioner's] products in the United States – and get paid!" JA 134a (email from Petitioner's officer to McIntyre America stating: "All we wish to do is sell our products in the States – and get paid! If this isn't possible then the only other option open to us is for us to split up in an amiable fashion as quickly as we can. I note that you still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full."). To that end, Petitioner's own officials attended dozens of trade shows in the United States in an effort to promote the sales of its machines to U S customers, JA 114a-117a, and McIntyre America "structured [its] advertising and sales efforts in accordance with [Petitioner's] direction and guidance whenever possible " JA 124a.

To reject jurisdiction in this case would be to embrace the strange principle that the whole (the United States) is somehow *less* than the sum of its parts (the individual states). Petitioner, for example, expresses concern that a defendant who purposefully seeks access to the U.S. market could be subject to jurisdiction in New Jersey even if it had not "thought about New Jersey or even knew that it exists." Pet. Br. 27. It is logically impossible, however, to serve the U.S. market generally without serving the states that comprise the United States. Even for a hypothetical defendant who aggressively seeks access to the U.S. market but is unaware that particular states "exist[ ]," Pet. Br. 27, there should be no surprise that jurisdiction would be proper in *some* court within the territory of the U.S. market from which it purposefully sought to profit.

Indeed, the conclusion that Petitioner established minimum contacts with New Jersey is supported by both sides of this Court's 4-4 split in *Asahi*. As explained *supra* Part I, both Justice Brennan and Justice O'Connor endorse the core principle that a manufacturer establishes minimum contacts with the forum when it seeks to serve – directly or indirectly – the market in the forum state and its product thereby causes injury in that state. For Justice Brennan, sufficient contacts exist when a manufacturer "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Asahi*, 480 U.S. at 119-20 (Brennan, J.). In this situation, the manufacturer

"benefits economically from the retail sale of [its] product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Id.* at 117. "These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State." *Id.* The shear machine at issue in this case reached New Jersey via a "chain of distribution," *id.* at 120, that led from Petitioner, to the U.S. distributor that it retained for the explicit purpose of selling its machines to U.S. customers, to the New Jersey customer who purchased the machine. That the machine involved in this case reached New Jersey is hardly due to "unpredictable currents or eddies." *Id.* at 117.

Justice O'Connor, admittedly, reasoned that a defendant's efforts must be more than mere "placement of a product into the stream of commerce." *Asahi*, 480 U.S. at 112 (O'Connor, J.). But even Justice O'Connor would find the minimum-contacts test satisfied where the defendant's conduct "indicate[s] an intent or purpose to *serve the market* in the forum State." *Id.* (emphasis added).[6] When a defendant

[6] Such conduct may include, among other things, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112.

designs its product to comply with U.S. safety standards, designates a U.S. distributor to serve the U.S. market in its entirety, and takes further steps to facilitate sales within that undifferentiated U.S. market, it manifests an intent or purpose to serve, at least indirectly, the markets in the states that comprise the United States.

On this issue, it is worth noting lower court decisions that Justice O'Connor cited in her *Asahi* opinion in explaining why jurisdiction was improper on the facts of *Asahi*. Stating that Asahi had not "designed its product in anticipation of sales in California," Justice O'Connor compared *Asahi* to *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (E.D. Pa. 1982).[7] The defendant in *Rockwell* was SNFA, a French corporation that manufactured ball-bearing assemblies designed to be used in a particular helicopter called the A-109. SNFA sold its assemblies to its Italian subsidiary, which sold them to the Italian helicopter manufacturer (Agusta), which incorporated the bearings into its A-109 helicopters. Agusta then sold the helicopters to a U.S. distributor in Delaware that would in turn sell to consumers in the United States. *Id.* at 329.

[7] *See Asahi*, 480 U.S. at 113 (O'Connor, J.) ("There is no evidence that Asahi designed its product in anticipation of sales in California. Cf. *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F Supp. 328 (E D. Pa. 1982).").

Even though SNFA played no role in distributing the helicopters themselves in the United States, jurisdiction was appropriate in Pennsylvania because SNFA had purposefully designed its bearing assemblies for use in the A-109 helicopter and was "aware that the A-109 helicopter was targeted for the executive corporate transport market in the United States and Europe." *Id.* at 330. "Given the distribution system, SNFA had ample reason to know and expect that its bearing, as a unique part of a larger product, would be marketed in *any* or *all* states, including the Commonwealth of Pennsylvania." *Id.* at 333 (emphasis in original).

The logic of *Rockwell* applies with even stronger force to this case. Petitioner not only *knew* of the distribution system that would lead its products to the U.S. market, it purposefully engaged the U.S. distributor who would serve that function. Here, as in *Rockwell*, the Petitioner manufactured the product with the knowledge that it would be sold in the United States; Petitioner even touted its product's compliance with U.S. safety standards. Here, as in *Rockwell*, it makes no difference that the Petitioner did not specifically target the *individual* states that comprise the United States.[8]

[8] Justice O'Connor also cited *Hicks v. Kawasaki Heavy Industries*, 452 F. Supp. 130 (M.D. Pa. 1978). *See Asahi*, 480 U.S. at 112-13 (O'Connor, J.) Unlike in *Hicks*, Justice O'Connor noted, Asahi did not "create, control, or employ the distribution system" that brought its product to the forum. In *Hicks*, on the

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Accordingly, Justice O'Connor's conclusion that Asahi had not established minimum contacts with California is entirely reconcilable with upholding jurisdiction in this case. Moreover, the direct-distribution scenario here involves qualitatively more purposeful and direct contacts than those in *Asahi*. Asahi had sold its tire valves to Cheng Shin, a Taiwanese manufacturer who in turn used Asahi's valves as components for its tire tubes. *Id.* at 106. Cheng Shin's fully assembled tire tubes were then delivered to the United States. *Id.* In the *Asahi* scenario, the component manufacturer played no role at all in defining where the finished tire tubes that happened

other hand, a Japanese motorcycle manufacturer had established minimum contacts with Pennsylvania even though it sold its products *only* to its U.S. subsidiary and not to particular consumers in particular U.S. states. *Hicks* reasoned that "[t]he manufacturer has the minimum contacts required by due process and is doing business by means of *indirect* shipments of goods into the state." *Id.* at 134 (emphasis added). It was irrelevant, therefore, that "the product was not directly placed in the state by [the Japanese manufacturer] but rather was marketed by one whom the [manufacturer] could foresee would cause the product to enter Pennsylvania." *Id.* It was also not necessary to show that the Japanese manufacturer had exercised "corporate control" over its U.S. subsidiary and distributor. *Id.* at 134-35. As *Hicks* explained: "Any other result would permit a foreign corporation to market its product in this state, profit from its sale here and yet retain immunity simply by structuring its business operations so as to avoid direct activity in the Commonwealth." *Id.* at 134. Likewise, in the case at bar, a lack of "direct activity" in New Jersey would not foreclose jurisdiction.

to contain Asahi's valves would be sold. *Id.* at 112 (O'Connor, J.) ("[Asahi] did not create, control, or employ the distribution system that brought its valves to California."). Under the logic of Justice O'Connor's opinion, one might say that such a component manufacturer acts to serve the needs of the finished-product manufacturer (in Taiwan), not the market where the finished product is ultimately purchased.

In this case, by contrast, Petitioner defined the scope of distribution by entering into a distribution arrangement with a U.S. distributor that contemplated sales of its already-finished product throughout the United States. Petitioner's own materials touted its product's purported compliance with U.S. safety standards. It would be strange indeed to say that Petitioner's U.S. distributor in Ohio was the "market" that Petitioner sought to serve. Such a distributor is purely a conduit that adds no value *other* than to reach the market designated by the manufacturer. Petitioner's economic rationale for enlisting McIntyre America was to give Petitioner access to the entire U.S. market. As the record confirms, Petitioner sought to "sell [its] products in the United States – and get paid!" JA 134a.[9]

[9] This comparison to *Asahi* is not a concession that minimum contacts are necessarily lacking when a manufacturer's product is incorporated into the finished product of another manufacturer. Four Justices concluded that Asahi had indeed established minimum contacts with California, *Asahi*, 480 U.S.

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To refuse jurisdiction in this case would mean that a manufacturer who deliberately seeks to access the U.S. market could evade jurisdiction in the particular U.S. state where a defective product is distributed and causes injury. Indeed, the arguments presented by Petitioner and its amici would insulate such a manufacturer from jurisdiction in *any* U.S. state, despite its purposeful efforts to access the entire U.S. market.[10] A manufacturer should not be

at 121 (Brennan, J.). Such a component manufacturer, after all, "benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State." *Id.* at 117 (Brennan, J.). As explained above, the direct-distribution scenario presented in this case is *a fortiori* stronger than the facts of *Asahi*.

[10] *See* Chamber of Commerce Amicus Br. at 19 (arguing that its approach "may, of course, result in certain cases where a citizen of the forum state is injured in the forum state by an overseas manufacturer's product and yet not have an American forum in which to sue the manufacturer"). The briefs of Petitioner and its amici acknowledge only a single method by which Mr. Nicastro could obtain relief in a U.S. court on these facts – sue the now-bankrupt distributor McIntyre America in *its* home state of Ohio on a substantive theory that it is liable for Petitioner's manufacturing or design defects. *See* PLAC Amicus Br. 23. That the Petitioner's U.S. distributor is bankrupt may reveal yet another reason why jurisdiction is more compelling in this case than on the facts of *Asahi*. The end-product manufacturer in *Asahi* incorporated Asahi's components into a new product, a tire tube, which had a market value independent of the individual components it contained. By contrast, a mere distributor – particularly one whose sole job is to sell a single manufacturer's products – may not have the sort of robust, value-adding

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able to seek out U.S. customers for its products but then evade accountability in U.S. courts when those products cause injuries within the United States. For the reasons explained above, the Fourteenth Amendment does not incapacitate American courts from deciding claims arising from a foreign manufacturer's purposeful conduct directed at the U.S. market.

III. ALLOWING JURISDICTION WOULD NOT CONFLATE "NATIONAL CONTACTS" WITH "STATE CONTACTS"

Contrary to the arguments of Petitioner's amici, to allow jurisdiction in this case would not be to exercise jurisdiction based on "national contacts"

business that would generate the assets needed to pay judgments when those products cause injuries.

In any event, none of the Petitioner-side briefs concede that Ohio (or any other U.S. court) could obtain jurisdiction over *Petitioner*, despite Petitioner's purposeful efforts to access the U.S. market for its products. Even if Petitioner itself were subject to jurisdiction in Ohio, that would not undermine the propriety of jurisdiction in New Jersey – the state to which the product was ultimately sold to an end user, and in which the product caused injury Petitioner entered into an arrangement with a U.S. distributor that sought to access the entire U.S. market If any of the relevant contacts in this case are "fortuitous," it is not that Petitioner's shear machine ended up in New Jersey, but rather that its national distributor, on whom Petitioner bestowed exclusive rights to distribute its machines throughout the United States, happened to be based in Ohio rather than any of the other U.S states.

rather than on contacts with the forum state. Jurisdiction does not hinge on a principle that *any* contacts *anywhere* in the United States automatically count as contacts with *every* state. A manufacturer who arranges with a distributor to sell its goods *only* in a single state's market does not necessarily become amenable to jurisdiction throughout the United States."

A defendant like Petitioner, by contrast, purposefully acts to serve the entire U.S. market. By doing so, Petitioner is serving – at least indirectly – the market in each of the fifty states. Such a defendant's purposeful efforts to access customers in the states that *comprise* the United States constitute minimum contacts *with those states*. They therefore justify jurisdiction when the defendant's product is ultimately sold to a customer in the forum state and causes injury in that state. Under a national contacts

[11] Relatedly, businesses who serve their own local markets would not automatically become subject to jurisdiction nationwide. Thus, allowing jurisdiction in this case would not frustrate the concerns expressed in *World-Wide Volkswagen* that "a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there." 444 U.S. at 296 (citing *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956); *Reilly v. Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1205 (D.N.J. 1974); *Uppgren v. Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170-171 (D. Minn. 1969)).

approach, on the other hand, Mr. Nicastro could sue Petitioner in all fifty states.

Accordingly, the insistence by Petitioner's amici that jurisdiction is unconstitutional absent congressional legislation is misguided. One amicus brief alludes to Justice O'Connor's suggestion in *Asahi* that "Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits." *Asahi*, 480 U.S. at 113 n.* (emphasis in original) (cited in Chamber of Commerce Amicus Br. 19). For all the reasons discussed above, however, established Fourteenth Amendment principles confirm that jurisdiction is appropriate in New Jersey, even under Justice O'Connor's own reasoning in *Asahi*.

The discussion by Petitioner's Amici of Federal Rule of Civil Procedure 4(k)(2), *see* Chamber of Commerce Amicus Br. 20-21; PLAC Amicus Br. 27-28, is similarly misplaced. It is not suggested that Rule 4(k)(2) would allow a U.S. federal court to exercise jurisdiction over *this* case; Rule 4(k)(2) applies only to claims that "arise[ ] under federal law." Fed. R. Civ. P. 4(k)(2). Rather, amici invoke Rule 4(k)(2) in an attempt to buttress their mistaken view that Petitioner has not made sufficient contacts with New Jersey (or any U.S. state) to satisfy the Fourteenth Amendment.

It is correct that Rule 4(k)(2) allows a federal court to exercise jurisdiction in federal-question cases where a state court could not do so,[12] and that the constitutionality of a federal court's assertion of jurisdiction under Rule 4(k)(2) would be governed by the Fifth Amendment's, rather than the Fourteenth Amendment's, Due Process Clause.[13] But these principles say nothing at all about when state court jurisdiction *is* permissible under the Fourteenth Amendment. The *Omni Capital* decision that precipitated the enactment of Rule 4(k)(2) is instructive. *See* Fed. R. Civ. P. 4, advisory committee notes (1993 amendment, subdivision (k)) (citing *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987)). This Court in *Omni Capital* did not hold or even intimate that the Fourteenth Amendment

[12] Before Rule 4(k)(2), a federal district court's assertion of personal jurisdiction was generally limited to that which a *state* court in that same state could exercise. *See* Fed. R. Civ. P. 4(k)(1)(A). This could create a "gap" in the enforcement of federal law if the relevant state court could not exercise jurisdiction. *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) (rejecting argument that this Court should, via decisional law, "fashion[ ] a remedy to fill a gap in the Federal Rules of Civil Procedure").

[13] *See* Fed. R. Civ. P. 4, advisory committee notes (1993 Amendment) ("There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment.")

forbade Louisiana from exercising jurisdiction over the defendant. Rather, Louisiana's long-arm statute had voluntarily restricted the scope of its state courts' jurisdiction. *Omni Capital*, 484 U.S. at 108. While Rule 4(k)(2)'s Advisory Committee Notes recognize that the rule would also allow a federal court to exercise federal-question jurisdiction in a case where a defendant has "insufficient contact with any single state to . . . meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction," Fed. R. Civ. P. 4, advisory committee notes (1993 amendment, subdivision (k)), that does not prejudge the question of whether the Fourteenth Amendment is or is not satisfied in any given situation.

In this case, jurisdiction is justified based on Petitioner's purposeful efforts to serve, at least indirectly, the New Jersey market. Accordingly, upholding jurisdiction is entirely consistent with the premise that the Fourteenth Amendment's Due Process Clause requires minimum contacts with the forum State.[14]

[14] This Court has stated that the constitutional limitations on personal jurisdiction are "ultimately a function of the individual liberty interest preserved by the Due Process Clause," rather than "federalism concerns" that "operate[ ] as an independent restriction on the sovereign power of [state] court[s]." *Insurance Corp. of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982); *accord Burger King*, 471 U S at 472 n.13 ("Although [the Due Process Clause] operates to restrict state power, it must be seen as ultimately a function of the individual liberty interest preserved by the Due

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IV. ALLOWING JURISDICTION WILL NOT INVITE "A SUBJECTIVE JUDGE-BY-JUDGE ASSESSMENT OF WHAT IS FAIR AND JUST" OR DEPRIVE DEFENDANTS OF "FAIR WARNING" THAT THEIR CONDUCT WILL SUBJECT THEM TO JURISDICTION.

Quoting Justice Scalia's opinion in *Burnham v. Superior Court*, 495 U.S. 604, 623 (1991), Petitioner

Process Clause rather than as a function of federalism concerns " (quotations omitted)). This individual-liberty rationale has led some to question whether minimum contacts with the forum state should remain a "constitutional touchstone" for Due Process purposes, *Burger King*, 471 U.S at 474, rather than more traditional Due Process concerns. *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115 (1981) (arguing that constitutional limits on personal jurisdiction should "reflect the traditional due process concern for preventing injustice to the individual" rather than "prelitigation contacts between the defendant and the forum"); *see also* Patrick J Borchers, *The Death of the Constitutional Law of Personal Jurisdiction. From* Pennoyer *to* Burnham *and Back Again*, 24 U C. DAVIS L. REV. 19 (1990); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV 617 (2006) Some have also questioned whether a *foreign* defendant must establish minimum contacts with any particular state (rather than with the United States as a whole), noting that "for international law purposes it is inconsequential how . . power is allocated among political subdivisions within [a] country." Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L REV. 85, 126-127 & n.155 (1983). The case at bar, however, does not require this Court to revisit the premise that minimum contacts with the forum state are required, because Petitioner has indeed established minimum contacts with New Jersey as explained above.

asserts that allowing jurisdiction in this case will lead to a "subjective judge-by-judge assessment of what is fair and just."[15] To the contrary, Justice Scalia's *Burnham* opinion confirms that such subjectivity can be avoided just as readily by a rule that *permits* jurisdiction in a particular scenario as by one that *forbids* jurisdiction in a particular scenario.

In *Burnham*, Justice Scalia's plurality opinion adopted a rule that service of process on a defendant within the forum state was per se constitutional. 495 U.S. at 619 (Scalia, J.) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process."). Justice Scalia argued that such a categorical approach would avoid "uncertainty and litigation over the preliminary issue of the forum's competence," and therefore was preferable to a "totality of the circumstances" test that would make the propriety of such transient jurisdiction vary on a case-by-case basis. *Id.* at 626; *id.* at 623 (criticizing an approach that would invite a "subjective assessment of what is fair and just").

Likewise, this Court would minimize potential uncertainty and subjectivity by articulating a clear rule that a manufacturer establishes minimum contacts with the forum state when it purposefully endeavors to access the U.S. market generally and its product is thereby distributed to and causes injury in

[15] Pet. Br. 41, 48 (quoting *Burnham*, 495 U.S. at 623 (Scalia, J.)).

the forum state. As discussed *supra* Parts I & II, this principle is well-supported by this Court's case law. Although this principle will not mechanically determine the propriety of jurisdiction for every set of facts that courts might be faced with going forward, it provides a predictable answer to a fairly common scenario.[16]

Petitioner's argument that allowing jurisdiction would deny defendants "fair warning" that their conduct will subject them to jurisdiction is similarly unavailing.[17] There is, admittedly, a potentially

[16] Jurisdictional rules may always remain somewhat murky at the margins. This Court's recent decision in *Hertz Corp v Friend*, 130 S. Ct. 1181 (2010), unanimously embraced the so-called "nerve center" test for determining a corporation's principal place of business for purposes of federal diversity jurisdiction, *id.* at 1186, noting that the "administrative simplicity" of this approach would "promote greater predictability." *Id.* at 1193. But this Court candidly recognized that "there may be no perfect test," and that "there will be hard cases" even under the "nerve center" approach. *Id.* at 1194; *see also Burnham*, 495 U.S. at 626 (Scalia, J.) (noting the "evils" of "uncertainty and litigation over the preliminary issue of the forum's competence" but recognizing: "It may be that those evils . . must be accepted at the margins" (citing *Asahi*)).

[17] *See* Pet. Br. 18 (quoting *Burger King*, 471 U S. at 472) With respect to subjectivity and fair warning, Petitioner's critique of Justice Brennan's *Asahi* opinion as compared to Justice O'Connor's *Asahi* opinion is somewhat puzzling. Petitioner describes Justice Brennan's emphasis on whether the defendant was "aware" that its goods would be sold in the forum as a troubling inquiry into a defendant's "mere state of mind." Pet. Br. 44. Yet Petitioner embraces Justice O'Connor's opinion, which would inquire whether the defendant acted with "an

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circular quality to the idea that defendants must "have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," *Burger King*, 471 U.S. at 472 (citations omitted), and to the related idea that jurisdiction must be "foreseeable" in the sense that defendants "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen*, 444 U.S. at 296-297. It is, after all, the jurisdictional principles *themselves* that would make jurisdiction foreseeable or would otherwise provide fair warning of what activity will subject a defendant to jurisdiction.[18] If applied unthinkingly, these concepts could yield problematic results at both ends of the jurisdictional spectrum. At one extreme, they could legitimate a state's plainly exorbitant exercise of jurisdiction so long as the

intent or purpose to serve the market in the forum State," *id* at 112 (O'Connor, J.), even though that standard also seems to implicate a defendant's state of mind. In any event, as explained *supra* Parts I & II, Justice O'Connor's reasoning in *Asahi* is entirely consistent with finding jurisdiction in this case. To be clear, Justice Brennan's *Asahi* opinion did not require that the defendant was aware that any specific product was in fact purchased by a customer in the forum state; he reasoned that minimum contacts were established when a manufacturer "delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State." *Asahi*, 480 U.S. at 119-20 (Brennan, J.) (emphasis in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 298)

[18] *See* Redish, *supra* note 14, at 1134 ("[A] potential defendant can only have such an expectation because the law so provides.").

state's law was clear enough to give defendants notice of its desired jurisdictional scope. At the other extreme, these notions could foreclose *any* evolution of jurisdictional principles; *International Shoe*'s recognition that an absent defendant can be subject to jurisdiction if it establishes minimum contacts with the forum state would have foundered on the argument that defendants lacked "fair warning" that *Pennoyer*'s requirement of in-forum service of process would be relaxed.[19]

Whatever independent legwork "fair warning" or "foreseeability" perform in this Court's jurisdictional analysis, those requirements are more than satisfied here. It should come as no surprise that a manufacturer who purposefully seeks access to the U.S. market would be subject to jurisdiction within the territory of that market for claims that arise from the sale of its products there. As explained above, such jurisdiction is supported by this Court's long-standing, unquestioned basic principles, *see supra* Part I, by both sides of the split between Justices Brennan and O'Connor in *Asahi*, and even by lower court cases cited by Justice O'Connor in articulating

[19] The requirements of "foreseeability" and "fair warning" are surely not designed to create a form of jurisdictional "qualified immunity" that would prevent jurisdiction unless the constitutionality of such jurisdiction was "clearly established." *Cf., e.g., Anderson v. Creighton*, 483 U.S. 635 (1987) (describing government officials' qualified immunity from civil damage awards unless their conduct runs afoul of "clearly established" constitutional principles).

her ostensibly narrower view of the minimum-contacts test. *See supra* Part II. Jurisdiction is also supported by numerous lower court decisions since *Asahi*, which have embraced the idea that when a defendant endeavors to serve a broad market such as the U.S., it purposefully acts to serve the smaller markets that comprise it.[20] Petitioner attempts to characterize many of these decisions as examples of "abuse by lower courts." Pet. Br. 45. In fact, these decisions confirm that jurisdiction is proper under a straightforward application of this Court's principles.

V. THE NEW JERSEY SUPREME COURT'S CONCLUSION THAT PERSONAL JURISDICTION EXISTS IS CONSISTENT WITH THIS COURT'S CASE LAW AND SHOULD BE AFFIRMED.

Fixating on a few snippets in the majority opinion below, Petitioner and its amici argue that the Supreme Court of New Jersey drastically misapplied this Court's jurisdictional doctrine. In particular, they argue that the majority opinion would permit jurisdiction even without the defendant establishing

[20] *See, e.g., Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243-44 (2d Cir. 1999); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994); *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1360-64 (Ariz. 1995); *Wright v. American Home Products Corp.*, 768 A.2d 518, 531-36 (Del. Super. 2000).

"minimum contacts" with the forum. This critique mistakes semantics for substance.

Admittedly, the New Jersey Supreme Court's opinion refers to a "stream of commerce" theory of jurisdiction that is distinct from a "minimum contacts" theory of jurisdiction.[21] To parallel more precisely this Court's case law, the court should perhaps have written that one *situation* in which a manufacturer establishes "minimum contacts" with the forum is when, among other things, its products reach the forum via the "stream of commerce." So stated, there is nothing at all controversial about the lower court's reasoning.

Ultimately, of course, it is up to this Court to decide the legal issues presented by this case. As described above, jurisdiction is appropriate under this Court's established principles without regard to the particular reasoning employed by the New Jersey Supreme Court.[22] That said, the New Jersey Supreme

[21] *See* Pet App. 14a ("We do not find that J. McIntyre had a presence or minimum contacts in this State – in any jurisprudential sense – that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J McIntyre may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction."); *Id.* 42a (viewing "minimum contacts" as a "jurisdictional doctrine" that applies "in contract and other types of cases" while the "stream-of-commerce doctrine" is "particularly suitable in product-liability actions.")

[22] *See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 & n.15 (1986) (affirming judgment of the

(Continued on following page)

Court's decision is most certainly not a "limitless assertion of worldwide jurisdiction . . . without even a by-your-leave to this Court's jurisprudence." Pet. Br. 28. The New Jersey Supreme Court carefully explained why jurisdiction is consistent with both Justice Brennan's and Justice O'Connor's *Asahi* opinions on the minimum-contacts issue.[23] Although the opinion occasionally employs somewhat provocative language, Pet. App. 35a (noting a "radical transformation of the international economy" and a need to "discard outmoded constructs of jurisdiction in product-liability cases"), it does not ultimately "discard" anything. Its reasoning is fully consistent with the basic principle that jurisdiction is proper over a manufacturer who seeks to serve – directly or indirectly – the market in the forum state and its product thereby causes injury there. Pet. App. 3a ("Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey.").

♦

Court of Appeals even if certain aspects of its reasoning were erroneous).

[23] *See, e.g.*, Pet. App. 32a ("[T]he additional conduct required by Justice O'Connor under her stream-of-commerce approach would be the targeting of the national market."); *id.* at 32a-33a ("[E]ven under Justice O'Connor's approach, arguably, a manufacturer would be amenable to jurisdiction in every state that is part of its national distribution scheme.")

CONCLUSION

This Court should affirm the decision below.

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No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a state may, consistent with due process, exercise *in personam* jurisdiction over a foreign manufacturer pursuant to a stream-of-commerce theory solely because the manufacturer sells its products to a U.S.-based distributor that it "should know" targets a nationwide market and the product is purchased by a forum state consumer.

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INTEREST OF THE *AMICI CURIAE*

The Organization for International Investment and the Association of International Automobile Manufacturers Inc. are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting interstate and foreign commerce, and in promoting policies that secure for their members and this nation the benefits of an open national and global economy.[1]

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII is charged with promoting the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations across this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States in 2009 was approximately $2.3

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[1] No party's counsel authored this brief (in whole or in part), and no person other than *amici*, their members, or their counsel contributed monetarily to this brief's preparation or submission. Jeffrey T. Green, a partner at Sidley Austin LLP, served as additional counsel for Petitioner through the Northwestern University School of Law Supreme Court Practicum. Mr. Green did not author or contribute in any way to the preparation of this brief. *Amici* are advised that, by virtue of blanket consent letters filed on October 15 and 13, 2010, by Petitioner and Respondents, respectively, all parties consent to the filing of this brief.

trillion. James K. Jackson, Congressional Research Serv., *Foreign Direct Investment in the United States: An Economic Analysis* 1 (July 28, 2010), *available at* http://www.fas.org/sgp/crs/misc/RS21857.pdf. Direct investment capital inflows in 2008 totaled approximately $325 billion. *Id.* Most of that amount, roughly $260 billion, represents new investments. *Id.* at 4. OFII's goal is to make the United States an increasingly attractive location for companies headquartered outside the United States to conduct more business and employ more Americans within our borders.

The Association of International Automobile Manufacturers Inc. (AIAM) is a not-for-profit trade association that represents international motor vehicle manufacturers and distributors, certain original equipment suppliers, and other automotive-related trade associations. AIAM's mission is to protect and promote the unique interests of international automakers in the United States. It is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety, fuel economy and the environment. AIAM's members account for 40 percent of all passenger cars and light trucks sold annually in the United States. Nationwide, international automakers have invested over $43 billion in U.S.-based production facilities, have a combined domestic production capacity of 4.2 million vehicles, directly employ over 80,000 Americans, and generate almost 600,000 U.S. jobs through dealerships and suppliers nationwide. AIAM's automobile manufacturer members include: American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America,

Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Inc., Nissan North America, Inc. Peugeot Motors of America, Subaru of America Inc. and Toyota Motor North America, Inc.

Automobile manufacturing today is an international business. AIAM's members are subsidiaries of global companies that design, manufacture, distribute and sell passenger vehicles and light-duty trucks all over the world. The legal issues addressed in this case are of major importance to AIAM's member companies, all of whom have considerable experience litigating in state and federal courts in the United States, especially cases involving product liability disputes.

SUMMARY OF ARGUMENT

The decision below represents a fundamental departure from bedrock legal principles this Court has defined and preserved over the course of many decades. First, this Court has time and again reaffirmed that a state court's exercise of personal jurisdiction over a defendant requires that the defendant itself have engaged in purposeful conduct directed at the particular forum state. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985); *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). Second, both in the context of personal jurisdiction and more generally, this Court has emphasized that courts must respect corporate distinctions. *United States* v. *Bestfoods*, 524 U.S. 51, 61–62 (1998); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925). Thus, each defendant's contacts with the forum state must be assessed individually and the actions of one legal entity may not

automatically be attributed to another. *Keeton*, 465 U.S. at 781 n.13.

In the decision below, the New Jersey Supreme Court disregards these requirements in multiple ways, which do particular harm in the context of international commerce. First, ignoring the difference between *a state* and *the United States*, the New Jersey Supreme Court discards the requirement that a defendant have at least some minimum contacts with the forum state in particular. Second, ignoring the requirement for purposeful contacts, the court finds jurisdiction based on what it believes a foreign manufacturer "should know" about the distribution scheme of an independent U.S. distributor. Given the likely prevalence of national distribution schemes, the court creates a new requirement that companies affirmatively avoid particular states, regardless of whether they have any contacts there in the first place. Finally, implicit in the court's discussion of the relationship between the defendant and its distributor is the court's reliance on the latter's conduct to find jurisdiction over the defendant, in disregard of their corporate independence and arms-length business relationship.

Based on their members' experience as companies within multinational corporate groups engaged in significant international commerce, *amici* can attest that these legal errors present serious real-world concerns for the conduct of their business and risk material negative consequences for the flow of international commerce. Indeed, the United States Department of Commerce has reported on the concerns of international investors regarding the fairness and predictability of the U.S. legal environment. See Charles G. Schott, U.S. Dep't of Commerce, The U.S. Litigation Environment and

Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 5–6 (Oct. 2008), *available at* http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf (*"Department of Commerce Report"*) (reporting results of multiple studies). Considering the large role that foreign direct investment plays in the U.S. economy and the many contributions that companies such as *amici*'s members make in terms of domestic employment and investment, increasing legal uncertainty risks undermining the continued vitality of the United States as a highly attractive destination for foreign investment.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT'S DEPARTURE FROM THIS COURT'S PRECEDENT REPRESENTS A SIGNIFICANT INTERFERENCE WITH THE CONDUCT OF INTERNATIONAL COMMERCE AND HARMS U.S. EFFORTS TO ATTRACT FOREIGN INVESTMENT.

A. The New Jersey Supreme Court Abandoned The "Constitutional Touchstone" That Requires A Defendant Purposefully To Establish Minimum Contacts In The Forum State.

The decision below devotes significant attention to purported policy interests of New Jersey in light of globalization and international commerce. But the New Jersey Supreme Court forgets the clear mandate of this Court: "Notwithstanding these considerations [of state interest] the constitutional touchstone remains whether the defendant purposefully

established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This constitutional bedrock focuses on two key elements: the purposeful actions of the defendant itself, and the nature of the defendant's contacts with the forum state in particular. The New Jersey Supreme Court discards both elements and therefore its judgment should be reversed.

Because the Due Process Clause protects individual liberty against state power, *Burger King*, 471 U.S. at 471-72, the focus of a court's personal jurisdiction analysis must be on the actions *of the defendant* that are purposefully directed toward the forum state. The New Jersey Supreme Court identified not a single action by the defendant J. McIntyre purposefully directed at New Jersey. Instead, the court discussed what J. McIntyre "should have" known based on the purportedly national distribution scheme employed by its independent distributor, an unrelated corporate entity and a separate defendant in the action.[2] But a defendant's amenability to suit in New Jersey must be based on its own actions, not the actions of legally distinct corporate entities, whether affiliated or not. Due process requires that each defendant's actions be "assessed individually" and that each have the requisite purposeful minimum contacts. *Keeton*, 465 U.S. at 781 n.13; see Section II *infra*.

Equally problematic is the New Jersey Supreme Court's attempt to erase the borders that distinguish

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[2] As the New Jersey Supreme Court expressly noted, "J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled, without any common ownership." Pet. App. 7a.

the State of New Jersey from the United States as a whole, effectively eliminating the sovereign bounds that our federal-state system imposes on each individual state. Contrary to the view of the New Jersey Supreme Court, state lines are not meaningless or outdated. This Court has held that personal jurisdiction requires minimum contacts with the *forum state*, not simply any state in the nation. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). As this Court emphasized in *World-Wide Volkswagen*, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* While this Court has expanded the limits of personal jurisdiction from strict territorial presence to minimum contacts with the forum state, it has never accepted the proposition that a state could exercise power over a defendant who had no "contacts, ties, or relations" with that state. *Id.* (quoting *Int'l Shoe*, 326 U.S. at 319). There is no basis for a state to have jurisdiction over a defendant based on the latter's contacts with other states in the nation. Moreover, in the context of a non-U.S. defendant, the need to ensure that states adhere to appropriate limits on their jurisdictional assertions carries even greater urgency, given the importance of comity presumptions against the extraterritorial reach of U.S. authority and the preeminent federal (rather than state) role in

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[1] The clear inference to be drawn from the plurality's analysis in *Asahi*—that state court jurisdiction must be based on contacts with that specific state, otherwise there would have been no reason to contrast that situation with the undisputed question of whether a federal court could exercise jurisdiction over a foreign defendant based on national contacts. *See Asahi Metal Indus.* v. *Superior Ct.*, 480 U.S. 102, 105 n.* (1987) (plurality opinion).

managing the country's relations with other nations. See, *e.g.*, *Japan Line, Ltd.* v. *Cnty. of L.A.*, 441 U.S. 434, 448 (1979); *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968); *McCulloch* v. *Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963) (recognizing that perceived affronts to foreign sovereign interests could "invite retaliatory action from other nations"); Gary B. Born, *Reflections on Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 30–31 (1987); see also Section III *infra*.

In an attempt to create some connection to New Jersey, the court below adopts what this Court has explicitly rejected—allowing mere foreseeability to serve as a basis for personal jurisdiction. "[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. Throughout its opinion, the New Jersey Supreme Court speaks in terms of what the defendant "should know" about where its products might end up, see Pet. App. 22a, 35a, 37a, 39a, 40a, rather than pointing to affirmative actions the defendant purposefully took to market or direct its products to New Jersey (that is because there were none). And, the only reason the court below offers for why the defendant "should know" its products might end up in New Jersey is the "national distribution scheme" purportedly used by its independent distributor.

The court hints that policy concerns about foreign manufacturers peddling defective products through distributors justify its sweeping rule. See, *e.g.*, Pet. App. 22a, 34a, 36a. Rejecting similar reasoning, this Court has explained that "[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such

contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

In practical effect, the New Jersey Supreme Court's rule would subject a foreign corporation to the jurisdiction of any state for simply accessing the U.S. market in any respect. At the very least, the rule creates significant and disturbing uncertainty and unpredictability for multinational corporations making fundamental decisions about where, whether, and how to do business. The New Jersey Supreme Court's decision improperly ignores this Court's instruction that due process allows entities to structure their operations to predict their amenability to suit. *World-Wide Volkswagen*, 444 U.S. at 297.

B. Increasing Legal Uncertainty Damages U.S. Efforts To Attract Foreign Direct Investment.

The United States is the largest recipient of foreign direct investment in the world.[4] United Nations Conference on Trade & Dev., *World Investment Report 2010* 4 (June 2010). This investment from

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[4] Foreign direct investment "occurs when non-resident firms or individuals commit their capital to a country for the long-term by purchasing a significant interest in existing domestic companies or assets, or creating new domestic legal entities or assets." Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 5 (Aug. 2007), *available at* http://www.instituteforlegalreform.com/component/docman/doc_download/230-issue-brief-lawsuits.html

abroad is an essential element of the United States economy, creating millions of jobs and proving needed financing for growth. One major explanation for this success is the rule of law and the efforts of all three branches of government to develop a sufficiently stable legal regime to encourage investment.

The U.S. Department of Commerce has reported, however, that the unpredictability and cost of litigation are among the top concerns of foreign businesses considering both whether to invest and whether to continue to invest in the United States. *Department of Commerce Report* at 5-6 (reporting results of multiple studies). For instance, a study jointly commissioned by New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer found concerns about the United States legal environment among business leaders in the financial services sector. *Sustaining New York's and the U.S.'s Global Financial Services Leadership* 15-16 (Jan. 2007), available at http://www.nyc.gov/html/om/pdf/ny_report_final.pdf ("*Bloomberg-Schumer Report*"). According to the *Bloomberg-Schumer Report*, the business leaders surveyed ranked a "fair and predictable legal environment" as the second most important factor in assessing potential countries in which to do business. *Id.* These business leaders believed the United States was at a disadvantage relative to the United Kingdom, for example, in part because of "concerns that the US legal environment is less fair and less predictable than the UK environment." *Id.*

Part of the unpredictability in the U.S. legal environment comes from our federal system, with its multitude of potential legal regimes that a company may encounter. In the *Department of Commerce Report*, the potential application of federal and state

law was noted as a "distinctive feature of the U.S. legal system" that an "international investor might find . . . unfamiliar." *Id.* at 3–4 & Box 1. Yet at that time, the Department was at least able to state with confidence that "[e]ven with 50 States (plus the District of Columbia), it is typically clear *which State legal systems are relevant*." *Id.* at 4 (emphasis added). If the New Jersey rule is upheld, the Department could no longer offer potential foreign investors even this modest assurance about the predictability of the U.S. legal environment because plaintiffs could always claim that companies selling products to a U.S. distributor "should know" their products might be distributed nationally and hale them into court in any state in which those products land. Indeed, the U.S. legal system would no longer be one in which businesses can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

A recent member survey by *amicus* OFII of 65 Chief Executive Officers of U.S. subsidiaries of foreign companies revealed that the costs associated with the United States legal system are seen as a drawback to investing here. OFII, *The Insourcing Survey, A CEO-Level Survey of U.S. Subsidiaries of Foreign Companies* 8 (April 2008), *available at* http://www.ofii.org/docs/ceo2008.pdf. A study conducted by Robert Litan, commissioned by the U.S. Chamber of Commerce, found similar results. Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 5 (August 2007), *available at* http://www.instituteforlegalreform.com/component/

ilr_docs/29/issue/LAI/STU.html.[5] In particular, Litan noted that "the multiplicity of governing jurisdictions creates both complexity and uncertainty" and reported that some of those surveyed "believe[d] the complexity and uncertainty stemming from [the U.S.] system may be worse than elsewhere." *Id.* at 16–17. If this fear of uncertainty existed when companies thought they could predict their amenability to suit based on their purposeful contacts with a given state, it will be orders of magnitude worse under New Jersey's nationwide "should have known" test, which subjects a company that accesses the U.S. market in any respect to a potential lawsuit in any state where its products end up.

C. The New Jersey Supreme Court Suggests That A Focus On A "Nationwide Distribution System" Limits The Scope Of Its Rule, But In Practical Operation Its Jurisdictional Test Is Limitless.

The nature of today's international commerce means that any company that sells a product into a given market "should know" of the theoretical possibility that the product might be re-sold anywhere within that market. A firm operating in international commerce may or may not seek out a market in a particular country (a manufacturer can grant regional or even global distribution rights); even if it plans or knows its goods will be sold in a particular country in general, it typically does not

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[5] Litan conducted interviews with representatives of several foreign companies that have invested or established operations in the United States, as well as with attorneys who have counseled foreign companies regarding U.S. investment decisions. *See id.* at 11–12.

affirmatively exclude the possibility of sales within a sub-part of that market. Moreover, consumers can now research and seek out products, even if those products are not marketed within their state. Thus, once a company sells products anywhere within the United States, they are in practical effect available everywhere through the unilateral action of others.

Yet, modern commerce and globalization cannot be used as an excuse by states to erase the restraints of due process protecting defendants or limits on the power of state judicial systems. The New Jersey Supreme Court argues that the growth in international business activity justifies its assertion over a foreign defendant with no actual "contacts, ties, or relations" with New Jersey. *Int'l Shoe*, 326 U.S. at 319. However, as this Court has reminded state courts in the past, "technological progress" and the "increased flow of commerce" have allowed for a more "flexible standard," but "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson* v. *Denckla*, 357 U.S. 235, 250–51 (1958). To be sure, the global economy has changed dramatically over the past 50 years, but the constitutional protections and limitations on state power have not. Moreover, there is no reason for this Court to modify its standards when Congress, which has plenary authority over international commerce, has not felt the need to legislate on the purported concerns about the global economy that apparently motivated the decision of the court below.

The application by the New Jersey Supreme Court of its new rule makes clear how limitless its standard actually is. The court below relied on precious few actual facts to argue that defendant J. McIntyre targeted a national market that included New Jersey.

First, the court simply asserted that the defendant "targeted the United States" and used an exclusive U.S. distributor. Pet. App. 38a–39a. It then found that the defendant "should have known" its independent distributor employed a nationwide distribution system because J. McIntyre officials attended trade shows in "various American cities." *Id.* at 39a. After the court concluded that it was "clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events," it decided that the mere attendance by a J. McIntyre official at a few such trade shows constituted "calculated efforts to penetrate the overall American market." *Id.* Thus, even though the court acknowledged that "J. McIntyre may not have had access to McIntyre America's customer list," it determined that J. McIntyre "knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held." *Id.* This is the full extent of the evidence upon which the New Jersey Supreme Court relied to hale J. McIntyre into court in New Jersey.

Simply put, selling products to an independent distributor in the United States and attending a few trade shows do not represent the "minimum contacts" with New Jersey required "such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice."'" *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *Int'l Shoe*, 326 U.S. at 316). If it were otherwise, foreign companies would face an unpredictable exposure to potential liability that could only create the most serious cause for concern when deciding whether to do any business in the United States at all. By contrast, insisting

that due process can only be satisfied when the defendant has purposefully availed itself of the benefits of the forum state provides at least enough predictability to allow foreign businesses to make sensible judgments based on calculable risk. The Constitution requires no less.

D. The Decision Below Places An Impractical And Unworkable Obligation On Companies To Take Affirmative Steps To Avoid Particular States.

Purporting to provide foreign companies some control over their amenability to suit in New Jersey, the court below tacked on an "escape clause" to its otherwise limitless jurisdictional test. According to the New Jersey Supreme Court, "[a] manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is *not* marketing its products in this State." Pet. App. 36a (emphasis added).

The New Jersey Supreme Court's "affirmative avoidance" obligation turns this Court's well-established rule on its head. This Court has always looked to a defendant's *purposeful* conduct directed at, or efforts to do business in, a particular state. *Burger King*, 471 U.S. at 472–75. The decision below would, in practice, impose jurisdiction by default anywhere a company's products end up and require a foreign company to take affirmative steps to avoid a particular state, even if it has no contacts there at all. Yet, this Court has rejected the proposition that "[e]very seller of chattels . . . appoint[s] the chattel his agent for service of process." *World-Wide Volkswagen*, 444 U.S. at 296.

Not only is this rule unworkable from a practical perspective, it is also undesirable. The rule would

create an incentive for companies to adopt extraordinary measures in the hope of blocking commerce with particular states, increasing costs to consumers there and complicating their access to the global marketplace. And, given the practical difficulties of affirmatively avoiding individual states, such a rule poses a very clear risk that some foreign producers will choose simply to abandon the United States market altogether.

II. THE NEW JERSEY SUPREME COURT'S DISREGARD OF CORPORATE DISTINCTIONS WILL NEGATIVELY AFFECT FOREIGN INVESTMENT IN THE UNITED STATES.

In the decision below, the New Jersey Supreme Court appears to have found jurisdiction largely based on the actions of a separate distributor. While it purported to find the necessary contacts based on J. McIntyre's decision to use a distributor and its supposed awareness of a national distribution scheme, it could point to nothing that J. McIntyre actually did that was directed toward New Jersey itself.

Perhaps aware of the feeble nature of this showing, the New Jersey Supreme Court then engaged in a vague discussion of the relationship between J. McIntyre and its distributor. See Pet. App. 40a. While never saying it outright, the court appeared to rely on this arms-length relationship between separate entities to establish jurisdiction over the defendant. *Id.* at 40a–41a (stating that J. McIntyre "should have known that *its* distribution scheme" reached New Jersey, even though distribution was the responsibility of an independent entity). At the very least, the court seems to have offered the discussion of the corporate interactions to bolster

implicitly its claim that asserting of jurisdiction over J. McIntyre would not "offend traditional notions of fair play and substantial justice." *Id.* at 11a. It is not surprising that the court did not own up to its blurring of corporate distinctions and unsupported attribution to find jurisdiction over the defendant. Given this Court's clear instructions regarding the need for a separate due process analysis as to *each* defendant and the respect for corporate distinctions, such an admission by the New Jersey Supreme Court would reveal error embedded in error.

A. The Actions Of Separate Corporate Entities Are Not Attributable To Each Other.

The "respect for corporate distinctions" is a "bedrock principle" of law "deeply ingrained in our economic and legal systems." *Bestfoods*, 524 U.S. at 61–62; *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises launched, and huge sums of capital attracted."). This fundamental principle of corporate law provides that "a corporation will not be held liable for the acts of its subsidiaries or other affiliated corporations." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43 (2007), much less for the actions of entirely unrelated corporate entities.

The rule of corporate separateness applies equally to the issue of personal jurisdiction. *Keeton*, 465 U.S.at 781 n.13; *Cannon Mfg. Co.*, 267 U.S. at 335–37; see also 18 Fletcher, *supra*, § 8640.50 (noting that "where the subsidiary is operated as a distinct corporation, the subsidiary's contacts with the forum cannot be imputed to the parent for jurisdictional purposes"); John A. Swain & Edwin E. Aguilar,

Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon *Doctrine*, 84 B.U. L. Rev. 145 (2004) (finding that *Cannon* is followed by a majority of courts referencing it).

Based on this "bedrock principle," this Court has long refused to ignore legitimate corporate distinctions in analyzing personal jurisdiction. See *Keeton*, 465 U.S. at 781 n.13; *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); *Cannon Mfg Co.*, 267 U.S. at 335–37. As this Court has emphasized, "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n.13 (citing *Consol. Textile Co.* v. *Gregory*, 289 U.S. 85, 88 (1933); *Peterson* v. *Chicago, R.I. & Pac. R.R.*, 205 U. S. 364, 391 (1907)); *Rush*, 444 U.S. at 332 ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."); *Phila. & Reading Ry.* v. *McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact . . . that 'subsidiary companies' did business within the state, warrant a finding that the defendant did business there."). The application of the doctrine of corporate separateness to questions of personal jurisdiction only makes sense. If a parent corporation cannot be held liable based on the acts of its subsidiary, its jurisdictional fate should also not depend on the actions of its subsidiary. Similar interests are at stake in both circumstances: the need for predictability in structuring business arrangements and investment decisions.

Thus, in a case where a foreign manufacturer's product is sold by a U.S. distributor, the court must evaluate "individually" each defendant's contacts

with the forum state. This is true where the distributor is completely independent, as in this case, and is equally the rule where the distributor may be a subsidiary or other affiliate of the foreign manufacturer.

To the extent there are concerns about potential misuse of the corporate form, this Court has made clear that "there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Bestfoods*, 524 U.S. at 62. But in the absence of any suggestion, much less a finding, that the corporate form has been misused, a court should not ignore the "respect for corporate distinctions" by attributing the acts of one corporate entity to another for purposes of finding the requisite jurisdictional contacts.

While this Court has noted that "the parties' relationships with each other may be significant in evaluating their ties to the forum," *Rush*, 444 U.S. at 332, it has always been careful to hold fast to that "constitutional touchstone" by emphasizing that "[t]he requirements of *International Shoe*, however, ***must be met as to each defendant*** over whom a state court exercises jurisdiction." *Id.* (emphasis added).

This Court has expressly recognized that due process protects the right of defendant corporations to structure their "primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Providing this "degree of predictability to the legal system" is critical to

maintaining a legal environment that continues to attract substantial foreign investment. *Id.*

B. Under The New Jersey Supreme Court's Rule, Foreign Companies Would Face Significantly Increased Risk From Having Subsidiaries In The United States.

Companies operating in the global marketplace—whether based in the United States or abroad—utilize a wide variety of corporate structures and business arrangements to bring their products from the place of manufacturing to the end market. Companies may establish subsidiaries or affiliates to serve different countries or regions or may sell their products to independent distributors in a country. These arrangements are not nefarious schemes to be battled by state courts; they are legitimate forms of carrying on beneficial international and interstate commerce. Moreover, many of these arrangements bring significant benefits to the U.S. economy in the form of foreign direct investment. In addition to being wrong as a legal matter, the decision below creates a number of negative consequences.

Under the New Jersey Supreme Court's rule, any foreign manufacturer parent could potentially be subject to jurisdiction in New Jersey and other states solely because it has a U.S. subsidiary that sells products in the U.S. market. After all, the court's rule allowed the assertion of jurisdiction over a foreign manufacturer based on its use of a completely independent U.S. distributor and a purported awareness of a national distribution scheme. If a court may assert jurisdiction on so slender a reed, foreign companies will have legitimate cause for concern in every state when considering setting up operations or subsidiary companies anywhere in the

United States. Based on the New Jersey Supreme Court's reasoning, any foreign producer could be said to be targeting "State X" because it placed a product into the stream of commerce and "should have known" that its distributor sold products to the U.S. market, which obviously includes "State X."

The U.S. subsidiaries of foreign companies provide significant benefits to the U.S. economy, which this decision risks by increasing legal uncertainty and creating legitimate fear of the U.S. legal system. The U.S. subsidiaries of foreign companies provide jobs to 5.5 million Americans and support an annual payroll of over $400 billion. OFII, Insourcing Facts, *available at* http://www.ofii.org/resources/insourcing-facts.html (last visited Nov. 17, 2010) ("Insourcing Facts"). Not only do foreign-owned businesses employ millions of Americans, they also indirectly support an additional 16 million jobs because they purchase 80 percent of their inputs from U.S. businesses. U.S. Dept. of Treasury, Fact Sheet: An Open Economy Is Vital to United States Prosperity (May 10, 2007), *available at* http://www.treas.gov/press/releases/hp395.htm. What is more, the jobs provided by these U.S. subsidiaries tend to be higher paying, offering an average compensation per worker of $73,121, which is 31.7 percent higher than compensation at all U.S. companies. See Insourcing Facts.

These U.S. subsidiaries also make significant investment expenditures here, spending almost $40 billion on research and development and $183 billion on plant construction and new equipment. See Insourcing Facts. In addition, they constitute a significant portion of U.S. corporate tax collections, bringing in almost $53 billion in 2007. Internal Revenue Serv., *Historical Summary: Foreign-Controlled Domestic Corporations as a Percentage of*

All Corporations, Selected Items for Selected Tax Years, 1971-2007, available at http://www.irs.gov/taxstats/bustaxstats/article/0,,id=96311,00.html.[9]

As discussed above, see Section I.B. *supra*, a country's legal environment represents one of the primary considerations when companies consider foreign investment opportunities. While the overall quality and fairness of the United States legal environment is widely recognized, foreign businesses investing here have expressed concern about the cost of litigation in the United States and the fairness and predictability of the legal environment. See *Department of Commerce Report* at 5–6. For companies considering whether to establish subsidiaries here or evaluating their continued investments, the New Jersey Supreme Court decision represents a significant blow to both fairness and predictability.

III. THE NEW JERSEY SUPREME COURT'S RULE OVERREACHES ITS SOVEREIGN POWER AND INTERFERES WITH THE CONDUCT OF THE NATION'S FOREIGN RELATIONS.

As Petitioner demonstrates in its brief on the merits, the requirements for personal jurisdiction also derive from the inherent limits of state authority. See, *e.g.*, *Hanson*, 357 U.S. at 251 (holding that the "requirements for personal jurisdiction over nonresidents . . . . are a consequence of territorial limitations on the power of the respective States"). More recently, this Court has strongly reaffirmed the fundamental underlying basis for personal jurisdiction, which is a state or nation's sovereign

[9] Data for tax year 2007 is the most recent available from the IRS.

power over its territory. *Burnham* v. *Super. Ct.*, 495 U.S. 604, 608–09, 618 (1990). This is why, even when expanding the limits of personal jurisdiction to allow jurisdiction over nonresident defendants, this Court has always required the existence of "minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen*, 444 U.S. at 291 (quoting *Int'l Shoe*, 326 U.S. at 316).

Moreover, because the New Jersey Supreme Court's decision burdens non-U.S. entities and international commerce, it presents a special concern. *Asahi Metal Indus. Co.* v. *Super. Ct.*, 480 U.S. 102, 115 (1987). A majority of this Court in *Asahi* concluded that a case involving a non-U.S. defendant calls for special consideration of the interests of other nations "as well as the Federal interest in Government's foreign relations policies." *Id.* The Court instructed that these interests require "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" and cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

In this case, the New Jersey Supreme Court's failure to adhere to the requirement of "minimum contacts" with the forum state involves more than just a question of individual liberty or interstate federalism, it touches on the proper role of the states vis-à-vis the federal government. The primacy of the federal role in relations with foreign governments and persons pervades the federal system established by the Constitution. See Born, *supra*, 17 Ga. J. Int'l & Comp. L. at 29–31, n.123. And, while this case does not involve direct state regulation of foreign

commerce, the Constitution's express grant of power to Congress to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, embodies the notion that "[f]oreign commerce is pre-eminently a matter of national concern." *Japan Line, Ltd.*, 441 U.S. at 448. As such, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* (quoting *Bd. of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)). While the grant of the foreign commerce power to Congress does not preclude state courts from exercising jurisdiction over foreign companies, it does call for heightened scrutiny to ensure that states' assertions of jurisdiction stay within their legitimate bounds and are reasonable. *Asahi*, 480 U.S. at 115. It also means that there is a branch of government with ample authority to weigh the competing concerns associated with the expansion of our global economy. That institution is Congress. But, in all events, a state's exercise of jurisdiction over a foreign company with no "contacts, ties, or relations" to that state cannot stand under our Constitutional system. *Int'l Shoe*, 310 U.S. at 319. This Court should reaffirm the fundamental principles of due process that protect each individual defendant from state court overreaching.

The rule adopted by the New Jersey Supreme Court would, in all practical reality, allow New Jersey to assert jurisdiction over a company from any nation whose products are sold somewhere in the United States. Not only is this unreasonable under the "great care" urged by the *Asahi* majority, it goes well beyond the "traditional notions of fair play and substantial justice" that allow jurisdiction over an "absent," or foreign, defendant "only with respect to

suits arising out of the absent defendant's contacts with the State." *Burnham*, 495 U.S. at 609–10 (quoting *Int'l Shoe*, 326 U.S. at 316).

CONCLUSION

For the reasons set forth above, and in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, ET UX.,

Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 100 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products, including automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability litigation and have potential impact on PLAC's members. This is such a case. Because many of PLAC's members are named as defendants in lawsuits involving products that are distributed in interstate and international commerce, PLAC has a vital interest in the proper interpretation of the stream of commerce theory of *in personam* jurisdiction.

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

STATEMENT

On October 11, 2001, Robert Nicastro suffered serious injuries to his right hand while operating a scrap metal shear at his workplace in Saddle Brook, New Jersey. The machine was manufactured by petitioner J. McIntyre Machinery, Ltd., a British corporation based in Nottingham, England. Six years earlier, in 1995, petitioner had sold the machine to McIntyre Machinery of America, Inc. (MMA), an unaffiliated distributor and Ohio corporation that has its principal place of business in Stow, Ohio. Also in 1995, MMA had sold the shear to Mr. Nicastro's New Jersey employer, Curcio Scrap Metal, Inc., and had shipped it to Saddle Brook with the "F.O.B. Point" (where title changes hands) indicated as "Stow, Ohio." Pet. App. 3a-7a; JA 43a; see Ohio Rev. Code §§ 1302.32(A), 1302.42(B).

Alleging that the machine manufactured by petitioner and sold by MMA was defective, Mr. Nicastro and his wife (respondents here) filed suit in 2003 against petitioner in New Jersey state court. Following jurisdictional discovery, the trial court dismissed the case for lack of personal jurisdiction, concluding that petitioner had "no contacts with the state of New Jersey." Pet. App. 130a. The trial court's decision rested on the following findings:

> The record does not reflect *any* activity taken on the part of the defendant in the state of New Jersey. The defendant has no contacts with the state of New Jersey. Defendant . . . does not directly market, sell, nor solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. . . . [D]efendant . . . does not maintain a sales staff in New Jersey, did not

> provide maintenance or repair services for it[s] products to businesses or individuals in N.J. . . . The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The defendant *does not have a single contact with New Jersey short of the machine in question ending up in this state.* The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but fails to produce any evidence as to that fact. Indeed, the evidence is that MMA is *not* a subsidiary of [defendant].

Id. at 130a (emphasis added and citations omitted).

The trial court acknowledged that there was disagreement over the proper formulation of the stream of commerce theory of personal jurisdiction, see *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987), but concluded that this difference in views did not affect the outcome. "[E]ven utilizing the most [lenient] form of the stream of commerce theory," the court reasoned, petitioner "would *not* be subject to personal jurisdiction in New Jersey" because there was "no evidence . . . establishing" that petitioner "had any expectation that its product would be purchased and utilized in New Jersey." Pet. App. 131a-32a (emphasis added); see also *id.* at 135a, 137a (reiterating that New Jersey courts lacked jurisdiction under any version of the stream of commerce theory).

The Appellate Division reversed, Pet. App. 73a-108a, and the Supreme Court of New Jersey upheld the Appellate Division's conclusion that the exercise of personal jurisdiction did not offend due process, *id.* at 1a-72a. The New Jersey Supreme Court began by

acknowledging that petitioner had no "minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." *Id.* at 14a. Notwithstanding that seemingly dispositive conclusion, the court went on to hold that New Jersey courts could exercise *in personam* jurisdiction over petitioner under the stream of commerce theory, which it viewed as a basis for jurisdiction that was *independent of* the minimum contacts test set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). See Pet. App. 14a, 19a.

First articulated in dicta in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), the stream of commerce theory posits that a state "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.[2] In *Asahi*, this Court sought to clarify the theory, and in the process offered several different conceptions of purposeful availment through the stream of commerce.

Justice O'Connor, writing for a four-Member plurality, took the view that the "placement of a product into the stream of commerce, without more,

[2] "[B]ecause the example used by the Court was directed at manufacturers and distributors," but "only the retail dealer and regional distributor were contesting jurisdiction" in *World-Wide Volkswagen*, this passage was dicta. *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So.2d 881, 887, 889 (La. 1999).

is *not* an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.) (emphasis added). In her view, "something more"—some "[a]dditional conduct of the defendant" and in particular "an action of the defendant purposefully directed toward the forum State"—must be shown before *in personam* jurisdiction may be exercised. *Id.* at 111-12 (emphasis omitted). Without deciding what would be sufficient to permit jurisdiction under the Due Process Clause, Justice O'Connor offered the following observations:

> Additional conduct of the defendant may include an intent or purpose to serve the market in the forum State, for example, [by] designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Id. at 112.

In an opinion authored by Justice Brennan, another bloc of four Justices took the contrary view that the mere placement of a product into the stream of commerce is enough to satisfy due process—as long as the manufacturer was aware that the "regular and anticipated flow" of the stream of commerce would carry the product into the forum state. *Asahi*, 480 U.S. at 116-17 (Brennan, J.). Finally, Justice Stevens wrote a separate concurrence suggesting that whether or not placement of a product into the stream of commerce satisfies the minimum contacts test turns on "the volume, the value, and the

hazardous character" of the product. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

The Supreme Court of New Jersey adopted a fourth approach. It held that a foreign manufacturer will be subject to personal jurisdiction "if it knows or *reasonably should know*" that products it placed into the stream of commerce "are being sold in New Jersey." Pet. App. 37a (emphasis added). Noting that petitioner targeted sales to the U.S. market generally, the New Jersey Supreme Court concluded that petitioner should have known that its products could be sold "to customers located anywhere in the United States"—a geographical region that necessarily includes New Jersey. *Id.* at 39a-40a. In asserting jurisdiction, the court also emphasized that "transnational commerce had accelerated" since *Asahi* was decided, resulting in a "global marketplace" and "modern economic world" that called for new approaches to personal jurisdiction. *Id.* at 31a; see also *id.* at 35a (citing the "radical transformation of the international economy"), 1a-2a, 33a, 42a. Relying on that rationale, the New Jersey Supreme Court upheld personal jurisdiction over petitioner. Justice Hoens, joined by Justice Rivera-Soto, criticized the majority in dissent for creating "a new test that consists of but one inquiry: whether a product has found its way here." *Id.* at 47a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question presented by this case is whether a defendant's contacts with the nation generally—rather than with a state forum specifically—can satisfy the minimum contacts

requirement, or whether the "new reality" of modern commerce has washed away the federalist notion of dual sovereignties altogether. This Court has consistently held that a state court may exercise specific jurisdiction only where a defendant has purposefully directed activities at that state's residents. The lower court, however, upheld personal jurisdiction on the ground that petitioner, a British corporation that manufacturers industrial shear machines in England, delivered products into a stream of commerce flowing into the United States—a geographical region that *includes* the forum state, but which is of course not commensurate to the state itself. In so holding, the lower court transformed the minimum contacts requirement into a "national contacts" requirement. This Court should reject that novel theory of personal jurisdiction and reaffirm the traditional territorial limitations that have always circumscribed a state's adjudicative authority.

I. To satisfy the minimum contacts requirement, a nonresident defendant must have purposefully availed itself of forum consumers. That requires a specific intent by the out-of-state manufacturer to exploit the state's market—not just mere awareness that a product could ultimately wind up in the forum. Placing a product into the stream of commerce may constitute such purposeful availment, but only where the manufacturer takes additional deliberate actions directed at forum residents. For that reason, Justice O'Connor's plurality opinion in *Asahi*, which requires some indicia of specific intent, is most consistent with this Court's precedents.

The lower court, however, did not even require mere awareness that a product would end up in the

forum state. Rather, it espoused a stream of commerce theory that would support personal jurisdiction where a defendant merely *should have known* that a product it placed into the stream of commerce (presumably, anywhere in the world) *could* ultimately make its way into the forum state. That test—which is based on constructive knowledge—expands jurisdiction well beyond the approach articulated in Justice Brennan's plurality opinion in *Asahi*, which would still require some form of actual knowledge on the part of the manufacturer.

Moreover, even Justice Brennan's broad interpretation of the stream of commerce theory would allow jurisdiction only where a product was actually being *marketed* in the forum state. Here, however, there is no record evidence supporting the proposition that the now-defunct Ohio distributor, McIntyre Machinery of America, specifically advertised or otherwise marketed petitioner's machines in New Jersey, much less that *petitioner itself* deliberately engaged in or directed such efforts, as Justice O'Connor's plurality opinion suggests is required. Petitioner's sole act was selling a shear machine to an independent company with the knowledge that the machine would, if resold, likely end up somewhere in the United States. But knowledge that a product might end up in *some* state—and the mere fact that it does—is a far cry from the purposeful direction toward a *specific state forum* that this Court's opinions have consistently required as a precondition for the exercise of *in personam* jurisdiction.

II. This Court has squarely rejected the notion that state lines are irrelevant for purposes of

personal jurisdiction. That is because the Fourteenth Amendment's restrictions on personal jurisdiction reflect, at bottom, traditional territorial limitations on state power. By basing personal jurisdiction on the fact that petitioner sought to take advantage of the United States market as a whole, rather than the New Jersey market in particular, the lower court effectively erased state lines—contravening the notion of states as independent sovereignties in our federalist system.

Where a federal court seeks to exercise personal jurisdiction over a defendant in a suit arising under federal law, the Fifth Amendment's Due Process Clause may permit personal jurisdiction based on contacts with the nation as a whole. That is only possible because the sovereign territory of the United States spans the fifty states. But where a state court seeks to assert jurisdiction in a case arising under state law, the Fourteenth Amendment's Due Process clause requires minimum contacts between the defendant and that state. Ignoring that fundamental principle, the lower court effectively authorized universal jurisdiction in each and every state without regard to the defendant's specific contacts in *any single one* of those states. That holding eviscerates the territorial limitations on state power rooted in federalism and implicit in the Constitution and in the minimum contacts analysis.

III. In jettisoning the traditional minimum contacts requirement for *in personam* jurisdiction, the lower court pointed to the "new reality" of the contemporary national and international economy. This Court, however, has expressly reaffirmed the continuing validity of the minimum contacts

standard—and its purposeful availment requirement—in the face of the changing economy.

In any event, the "new reality" of the global economy militates *against* rather than in favor of allowing personal jurisdiction over a manufacturer based upon mere awareness that its product could end up in a given state. That is because the changing nature of modern commerce has altered and augmented the traditional manufacturer-distributor paradigm. Now, any individual or company can readily purchase goods and resell them via novel internet-based distribution networks, thereby becoming *bona fide* resellers in their own right. A manufacturer that sells goods in today's economy is surely aware that its products may be resold—sometimes multiple times—via one of these new distribution mechanisms. The growing ease of interstate and international commerce is, if anything, a reason to adhere more faithfully to the requirement that a defendant be shown to have purposefully availed itself of a particular state forum before personal jurisdiction may be exercised.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT PERSONAL JURISDICTION MAY BE EXERCISED OVER AN OUT-OF-STATE DEFENDANT ONLY WHERE THE DEFENDANT SATISFIES THE MINIMUM CONTACTS TEST BY PURPOSEFULLY DIRECTING ACTIVITIES AT STATE RESIDENTS

A. The Minimum Contacts Test Is The *Exclusive* Test For Specific Jurisdiction

A state court may exercise personal jurisdiction over a nonresident defendant only if that defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). To satisfy the minimum contacts requirement, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

The lower court conceded that petitioner lacked the "minimum contacts . . . that would justify a New Jersey court to exercise jurisdiction in this case." Pet. App. 14a. That should have ended the matter. The court, however, went on to conclude that it could assert *in personam* jurisdiction over petitioner under the stream of commerce theory, which it viewed as a "new theory of state-court jurisdiction" *separate and apart* from the minimum contacts test. *Id.* at 14a, 19a, 42a. According to the New Jersey Supreme

Court, the "contemporary realities of modern commerce" necessitated that departure from the minimum contacts standard. *Id.* at 19a.

This Court has unambiguously explained, however, that—notwithstanding the changing nature of commerce—the "the constitutional touchstone" of whether personal jurisdiction comports with due process "remains whether the defendant purposefully established minimum contacts in the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985); see *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 108-09 (1987). The stream of commerce test, if satisfied, is simply *one way* that a defendant may establish the requisite minimum contacts; it does not, as the lower court erroneously assumed, allow an end run around that constitutionally mandated requirement.[3]

Having failed to recognize this bedrock principle—that minimum contacts are the *sine qua non* of specific jurisdiction—the lower court lost sight of the dispositive question in this case: whether, by delivering products into the stream of commerce, petitioner "'purposefully directed' [its] activities at residents of the forum." *Burger King*, 471 U.S. at 472 (quoting *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). More precisely, the question that the lower court failed to address—and which this Court must—is whether, merely by intending to sell

[3] Indeed, both plurality opinions in *Asahi* make clear that delivering a product into the stream of commerce can serve as the basis for personal jurisdiction only if, by so doing, the defendant "purposefully avails itself" of the state market. See *Asahi*, 480 U.S. at 110 (opinion of O'Connor, J.); *id.* at 116 (opinion of Brennan, J.).

its products *somewhere* in the United States, petitioner had purposefully directed its activities *specifically* at New Jersey residents.

B. Purposeful Availment Requires More Than Constructive Knowledge That Products Might Or Could End Up In A Particular State

Purposeful availment means just that: a *purpose* by the defendant to avail itself of a state's consumers. This Court has explained that, to satisfy this requirement, a defendant must have "deliberately exploited the [state's] market"—a standard akin to specific intent. *Keeton*, 465 U.S. at 781. Jurisdiction is proper, moreover, only where the "contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (quoting *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957)). "[R]andom, fortuitous, or attenuated contacts" do not suffice. *Ibid.* (internal quotations omitted). Of the competing approaches in *Asahi*, Justice O'Connor's plurality opinion is the most faithful to these requirements.

The lower court's analysis, in contrast, departs from these governing principles in multiple ways. To begin with, permitting jurisdiction based on mere *awareness* that a product might find its way to the forum would predictably subject defendants to jurisdiction based on the actions of third parties. That result directly contravenes the teaching of both *Burger King* and *World-Wide Volkswagen* that jurisdiction must rest on the *defendant's* purposeful actions, and not the actions of third parties. See

Burger King, 471 U.S. at 475; *World-Wide Volkswagen*, 444 U.S. at 295-98.

Nor does mere awareness of the possibility that a product might or could end up in a given state amount to the specific intent necessary to support personal jurisdiction. For that reason, Justice O'Connor's plurality opinion requires additional conduct indicative of such specific intent, such as direct marketing to forum residents or designing a product specifically for use in the forum state. The lower court's decision, however, would not even require awareness, much less purposeful conduct directed to the forum; rather, it would allow jurisdiction based on constructive knowledge—*i.e.*, where the defendant *should have known* that its products might end up in the forum state. See Pet. App. 39a-40a. That threshold is lower than even that articulated in Justice Brennan's plurality opinion, which still requires some form of *actual knowledge* that "the final product is being marketed in the forum State." *Asahi*, 480 U.S. at 117 (opinion of Brennan, J.).

As this Court has explained, "the forseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. Consistent with that requirement, this Court explained in *World-Wide Volkswagen* that the stream of commerce theory may serve as a basis for personal jurisdiction over a foreign manufacturer only if the manufacturer delivered products into the stream of

commerce with the specific "*expectation* that they will be purchased by consumers in the forum State." *Id.* at 298 (emphasis added).

Here, however, the lower court held that no such expectation is required; rather, it would impose jurisdiction over any foreign manufacturer that should have known that its products *could* end up in the forum state. That standard abandons any semblance of the "purposeful" direction toward forum consumers mandated by this Court's precedents—and by due process. See *Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 682 (1st Cir. 1992) ("The test is not knowledge of the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court there.") (internal quotations omitted). Notably, the U.S. District Court for the District of New Jersey has expressly rejected the New Jersey Supreme Court's decision in this case as "at odds with" both *Asahi* and *World-Wide Volkswagen*. *Leja* v. *Schmidt Mfg., Inc.*, 2010 WL 4116695, at *14 (D.N.J. Oct. 19, 2010).

C. The Defendant's Actions In This Case Fail To Qualify As Purposeful Availment And Would Not Satisfy Any Of The Tests Set Forth In *Asahi*

As noted, the only conduct relevant to the minimum contacts inquiry is the defendant's conduct—and whether that conduct is purposefully directed at forum residents. Justice O'Connor's plurality opinion in *Asahi* sets forth several representative examples of conduct that, either singly or in combination, might suffice to establish purposeful direction toward a forum state: "for

example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.).

In this case, petitioner's conduct was limited to selecting MMA as its U.S. distributor and selling its machines to MMA. Petitioner neither designed the machines for the New Jersey market nor advertised there. Here, the only potentially relevant consideration of those mentioned by Justice O'Connor in *Asahi* is whether petitioner marketed the product through a distributor who had agreed to serve as the "sales agent" for petitioner with regard to the product in the forum state.

The record, however, reflects no evidence of any distribution agreement between petitioner and MMA—much less one establishing an agency relationship or calling for MMA to sell or advertise petitioner's products in New Jersey. Indeed, there was no written contract of any sort between petitioner and MMA. Accordingly, there is no record evidence that MMA—a wholly independent company—had any obligation (or even intention) to take any action whatsoever in New Jersey, or that either MMA or petitioner made any deliberate sales efforts targeting that state.[4]

[4] See *Bridgeport Music, Inc.* v *Still N The Water Publishing*, 327 F.3d 472, 480 (6th Cir. 2003) (no jurisdiction under stream of commerce theory where defendant did not enter into distribution agreement placing obligation on the distributor to sell goods in the forum or any other state); *Narco Avionics, Inc.*

Nor is this a case in which a foreign manufacturer has "pour[ed] its products into a regional distributor with the expectation that the distributor will penetrate a *discrete*, multi-State trade area"—conduct that some courts have deemed sufficient to justify jurisdiction over the manufacturer in one of the targeted states. *Vandelune* v. *4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (emphasis added and internal quotations omitted). There is no record evidence that petitioner designed or sold the shear to MMA with any discrete trade area—much less particular state—in mind. Contrary to the lower court's opinion, then, petitioner's actions—selling products to a distributor in Ohio with the hope that the distributor would resell them somewhere in the United States—can hardly be characterized as deliberate "target[ing]" of the New Jersey market. Pet. App. 31a.

The Supreme Court of New Jersey nevertheless upheld jurisdiction on the ground that petitioner placed its product into the stream of commerce through a "distribution scheme" aimed at the U.S. market as a whole. Pet. App. 31a. Justice O'Connor's *Asahi* opinion, however, properly requires far more than that in referring to a foreign manufacturer's decision to "market[] the product through a distributor who has agreed to serve as the sales *agent* in the forum State." *Asahi*, 480 U.S. at 112 (emphasis added); see Pet. App. 32a-33a, 39a. That carefully chosen language does not encompass *every*

v. *Sportsman's Market, Inc.*, 792 F. Supp 398, 408 (E.D. Pa. 1992) (no jurisdiction under stream of commerce theory where foreign company had no control over wholly independent distributor and did not advertise in forum state).

situation in which a manufacturer elects to sell products to an intermediary that in turn agrees to resell them within the forum state. Instead, Justice O'Connor's plurality opinion expressly refers only to those distributors that have specifically agreed to serve as an "agent" for the manufacturer.

Not all distributorships create a principal-agent relationship. On the contrary, most distributorship agreements *expressly disclaim* an agency relationship between the manufacturer and the distributor. See 1 W.M. GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE § 3:6, at 90 (2010) ("The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). Where such an agency relationship is present, the actions of the agent may fairly be attributed to the principal. That is because an agent literally stands in the shoes—and is subject to the control—of the principal. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). As most lower courts have recognized, however, absent such a true agency relationship—including control of the agent by the principal—it is improper to attribute the actions of a distributor to a manufacturer for purposes of establishing personal jurisdiction. See, *e.g.*, *Kuenzle*

v. *HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 459 (10th Cir. 1996) (citing cases).[5]

Moreover, the New Jersey Supreme Court evidently failed to grasp that "distribution schemes" come in a wide variety of forms. See 1 W.M. GARNER, *supra*, §§ 1:11 to 1:31, at 22-36 (distinguishing among and discussing, among other things, distributorships, dealerships, product franchising, consignment operations, agency relationships, and manufacturer's representatives). Even within the category of product distributorships, distribution agreements can be quite complex and varied, the end result of an extensive arm's-length negotiation between sophisticated, wholly independent business entities. Far from being under the manufacturer's control, "[d]istribution systems are frequently independent of the manufacturer of the product or the retailer that sells it to the public." *Id.* § 1:2, at 5.

Judged against this real-world backdrop, sales agents have certain distinctive characteristics that

[5] As explained in the companion case of *Goodyear Luxembourg Tires, SA* v. *Brown*, No. 10-76, this Court's personal jurisdiction cases make clear that "[e]ach defendant's contacts with the forum State must be assessed *individually*." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (emphasis added). See Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioners, *Goodyear Luxembourg Tires, SA* v. *Brown*, No. 10-76, at 27 (filed Nov. 18, 2010). That principle, which generally prevents attribution or imputation to a defendant of the forum contacts of a corporate affiliate, finds additional support in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), as well as in well-established background principles of the law governing corporations. See No. 10-76 PLAC Br. 27-28.

set them apart in ways that are important to Justice O'Connor's approach:

> In an agency relationship, an independent business person is deputized as the agent for a supplier, usually in a particular territory. Legally, an agent represents the supplier and stands in its shoes; it usually does not have a separate legal identity from that of the supplier. The agent is responsible for selling the product to customers and for collecting the purchase price. An agent does not bear the risk of loss of the product or of collection from the customer. The agent does not set the price of the product or make any representation with respect to the product separately from the supplier's. The agent will usually be compensated through a salary and commission.

1 W.M. GARNER, *supra*, § 1:29, at 34. Because the sales agent "pays no fee and takes no risk," for example, an "agency relationship is usually not a franchise or dealership." *Id.* § 1:29, at 35.

Here, there is no suggestion that MMA agreed to serve as petitioner's agent or that it was otherwise under petitioner's control. Indeed, the lower court held that "[t]he focus [for purposes of personal jurisdiction] is not on the manufacturer's *control* of the distribution scheme, but rather on the manufacturer's *knowledge* of the distribution scheme through which it is receiving economic benefits." Pet. App. 37a (citing *Charles Gendler & Co.* v. *Telecom Equipment Corp.*, 508 A.2d 1127, 1138 (N.J. 1986)) (emphasis added). Aside from the fact that merely selecting "an entirely distinct, unaffiliated Ohio corporation to serve as its distributor" hardly

qualifies as a sophisticated "distribution scheme" exploited by petitioner, see Pet. App. 61a (Hoens, J., dissenting), the lower court's reasoning simply ignores the plain language of Justice O'Connor's opinion, which requires appointment of an "agent" in the forum state, thus establishing the requisite control to justify haling a manufacturer into court based on the agent's actions there. Despite the lower court's suggestion to the contrary, then, see Pet. App. 32a-33a, its analysis departs sharply from the stream of commerce theory articulated in Justice O'Connor's plurality opinion.

For all the attention surrounding the dueling plurality opinions in *Asahi*, moreover, Justice Brennan's opinion, like Justice O'Connor's, still requires that "the final product *is being marketed* in the forum State." *Asahi*, 480 U.S. at 117 (opinion of Brennan, J.) (emphasis added). Because there is no record evidence even showing that MMA was marketing the shear in New Jersey, much less that *petitioner* directed such efforts or itself deliberately engaged in marketing there, the state court lacks jurisdiction over petitioner even under Justice Brennan's more permissive stream of commerce theory.[6] And given that only four of petitioner's

[6] The lower court stated that a "manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State." Pet. App. 36a. Aside from seemingly (and impermissibly) shifting the burden of disproving personal jurisdiction to the defendant, see, *e.g.*, *Astro-Med, Inc.* v. *Nihon Kohden America, Inc.*, 591 F.3d 1, 8 (1st Cir. 2009) ("On a motion to dismiss for want of personal jurisdiction, the plaintiff ultimately bears the burden of persuading the court that jurisdiction exists") (citing *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)), that

products evidently have come to rest in the entire state of New Jersey, it is difficult to see how this case could possibly pass Justice Stevens's test, which would find purposeful availment where "a regular course of dealing . . . results in deliveries [in the state] of over 100,000 units annually over a period of several years." *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment). Petitioner's sole act was selling a machine to a company in Ohio with the knowledge that it would, if resold, ultimately come to rest *somewhere* in the United States. That knowledge fails to qualify as purposeful availment of the New Jersey market under any of the theories enunciated in *Asahi*.

Turning the purposeful availment requirement on its head, the lower court insisted that if petitioner wanted to avoid jurisdiction in New Jersey it should have taken "some reasonable step to *prevent* the distribution if its products in [the] State." Pet. 38a (emphasis added). That theory, however, attaches jurisdiction based not on purposeful action, but rather on *inaction*. Even though petitioner had no distribution agreement requiring MMA to market or sell its products anywhere in the United States, it was apparently still incumbent upon petitioner to enter into a contract expressly barring resale of its products in New Jersey to avoid being haled into court there. That stretches beyond the breaking point this Court's requirement that a defendant's own conduct be "purposefully directed" toward forum residents.

reasoning ignores the fact that petitioner *did* make clear that it had not marketed its product in New Jersey.

D. Faithful Adherence To This Court's Purposeful Availment Requirement Would Not Necessarily Deprive Product Liability Plaintiffs Of A U.S. Forum

The lower court suggested that applying this Court's purposeful availment requirement would deny any U.S. forum to plaintiffs injured by foreign-made goods distributed by third parties in the United States. That is incorrect. As a general matter, an injured plaintiff can sue the distributor in that company's home state, regardless of whether the foreign manufacturer itself is amenable to personal jurisdiction there. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (attaching strict liability to anyone "who *sells* any product in a defective condition") (emphasis added).[7] The distributor, of course, may then seek contribution or indemnity from the foreign manufacturer. See also 1 W.M. GARNER, *supra*, § 3:6, at 90 (noting that distribution agreements typically include a provision requiring both parties "to indemnify the other with respect to liability that is caused by the party at fault"). As a practical matter, then, plaintiffs injured by products sold by U.S.-based distributors or dealers are hardly left without a remedy in U.S. courts. Indeed, having sellers and distributors available in the United States as strict liability defendants may even increase the

[7] Those states that depart from Section 402A by prohibiting suits against nonmanufacturing sellers typically still permit such suits where the manufacturer is not subject to personal jurisdiction in the state. *E.g.*, Colorado Rev. Stat. § 13-21-402(2); Kan. Stat. § 60-3306; Ky. Rev. Stat § 411.340, Minn. Stat § 544.41; Wash. Rev. Code § 7.72.040(2).

likelihood of recovery, given the difficulties that can attend the collection of judgments from foreign defendants.

II. THE MINIMUM CONTACTS INQUIRY PROPERLY FOCUSES ON THE DEFENDANT'S CONTACTS WITH THE FORUM STATE, NOT WITH THE UNITED STATES AS A WHOLE

A. Merely Targeting The United States Market Does Not Constitute Action Purposefully Directed Towards Residents Of A Specific State

This Court spoke with one voice in *Asahi* regarding one crucial point: to satisfy the minimum contacts test under the stream of commerce theory, the defendant's actions must be purposefully directed toward the "forum State," not the United States as a whole. See *Asahi*, 480 U.S. at 110 (opinion of O'Connor, J.); *id.* at 116 (opinion of Brennan, J.). The lower court, however, upheld personal jurisdiction on the ground that petitioner placed products into a stream of commerce flowing into a geographical area that "*includes* New Jersey," namely the United States as a whole. Pet. App. 31a (emphasis added). Under that theory, selling products to an independent company that serves as a North American distributor (or a worldwide distributor) would render a manufacturer amenable to suit in New Jersey, because New Jersey is part of North America (and the world). Such attenuated contacts, however, are insufficient to support personal jurisdiction.

The only way to avoid this line-drawing problem is to adhere to the one line that has always mattered

for purposes of personal jurisdiction: the state line. See *World-Wide Volkswagen*, 444 U.S. at 293. That requires a showing that the defendant purposefully directed its activities *to the forum state*, not merely to a geographical region that includes the forum state. Moreover, as described in further detail below, by shifting the focus of the inquiry from state contacts to national contacts, the lower court decision ignores deeply rooted federalism concerns underlying the Fourteenth Amendment's Due Process Clause.

B. Federalism Principles Prevent State Court Jurisdiction Over An Out-Of-State Defendant Based On National Contacts

The restrictions on personal jurisdiction in the state courts "are more than a guarantee of immunity from inconvenient or distant litigation." *Hanson*, 357 U.S. at 251. Rather, "[t]hey are a consequence of territorial limitations on the power of the respective States." *Ibid*; see also *World-Wide Volkswagen*, 444 U.S. at 292 (minimum contacts requirement serves the dual functions of protecting defendant against the burden of litigation and ensuring states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in our federal system"). For that reason, this Court has expressly rejected the notion that "state lines are irrelevant for jurisdictional purposes"—a proposition that would violate the "principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293.

By authorizing state-court jurisdiction over every manufacturer that is aware that its product might be sold *somewhere* in the United States, the lower court converted the minimum contacts test into a *national*

contacts test. Such a test, if upheld, would effectively erase state lines altogether—in contravention of longstanding federalism principles and this Court's consistent focus on the defendant's contacts with the *forum state* (even with respect to alien defendants).

C. The Fourteenth Amendment's Due Process Clause Precludes A National Contacts Test For State Law Claims In State Court

The lower court's decision to base *in personam* jurisdiction on national rather than state contacts also violates the Fourteenth Amendment's Due Process Clause. Courts have recognized that where "a *federal court* is attempting to exercise personal jurisdiction over a defendant in a suit based upon a *federal statute* providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States." *Busch* v. *Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994) (emphasis added); see also *Pinker* v. *Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *Max Daetwyler Corp.* v. *R. Meyer*, 762 F.2d 290, 293-94 (3d Cir. 1985). Those same courts, however, have held that "where a *state* is attempting to get extraterritorial jurisdiction over a defendant, the inquiry is whether the defendant has had minimum contacts *with the state*." *Busch*, 11 F.3d at 1258 (emphasis added). This crucial distinction reflects the fact that the Fourteenth Amendment's Due Process Clause embodies limitations on state sovereignty that are not present in the Fifth Amendment context. See *Max Daetwyler Corp.*, 762 F.2d at 294 (noting that the interstate federalism

concerns animating the Fourteenth Amendment's Due Process Clause are diminished in the Fifth Amendment context).

Thus, as one influential commentator has noted, "[i]n federal question cases arising in federal courts, a 'pure' national contacts Due Process standard that looks solely to the defendant's contacts with the United States is appropriate." Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 39 (1987). Because the sovereign territory of the United States spans all fifty states, "[i]t necessarily follows that United States territory as a whole should be the relevant geographical unit for purposes of assessing minimum contacts by foreigners in federal question cases." *Id.* at 40.

Jurisdiction of state courts over claims based on state law is an entirely different matter. "*International Shoe* and its descendants impose a constitutional requirement that the defendant have contacts with the *forum state*. Affiliations with sister states, even those geographically adjacent, are inconsequential." Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 145 (1983) (emphasis added). Accordingly, the Fourteenth Amendment precludes "a state legislature from granting to its judicial branch the authority to exercise jurisdiction over an alien defendant on the basis of national contacts," even where the Fifth Amendment would permit such contacts to serve as a basis for personal jurisdiction over a federal question in federal court. *Ibid.*

This constitutional distinction between nationwide and statewide contacts is implicit in Federal Rule of Civil Procedure 4(k)(2), which

authorizes nationwide service of process for claims arising under federal law. Observing that the constitutional limitations on the exercise of personal jurisdiction by federal courts arise from the Fifth rather than the Fourteenth Amendment, the Advisory Committee's notes explain that the "Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." Fed. R. Civ. P. 4(k) advisory committee's note (1993). Accordingly, "[t]he due process analysis under Rule 4(k)(2) is nearly identical to traditional personal jurisdiction analysis with *one significant difference*: rather than considering contacts between the [foreign defendant] and the forum state, [courts] consider contacts with the nation as a whole." *Holland America Line Inc.* v. *Wärtsilä N. America, Inc.*, 485 F.3d 450, 462 (9th Cir. 2007).

Due process permits states to extend their jurisdictional reach across state lines, but only where the defendant has purposefully directed activities toward the forum state; it does not permit states to ignore state lines altogether by looking to a defendant's contacts with the entire nation. Yet that is precisely what the lower court did here: it upheld personal jurisdiction on the ground that by seeking to exploit the entire U.S. market, petitioner was necessarily aware that its products could be resold in one of the fifty states. In other words, the lower court created universal jurisdiction in all fifty states without regard to the nature or number of contacts in *any single one* of those states. That holding eviscerates the territorial limitations on state power inherent in the minimum contacts analysis. See *Max Daetwyler Corp.*, 762 F.2d at 294 ("[T]he scope of

[the minimum contacts inquiry] necessarily acknowledges that the constitutionality of a state's assertion of in personam jurisdiction reflects territorial limitations on the power of an individual state."). Surely those territorial limitations, rooted as they are in our federalist system and in our Constitution, cannot be so casually cast aside as "outmoded constructs of jurisdiction." Pet. App. 35a.

III. THE "NEW REALITY" OF THE MODERN ECONOMY MILITATES *AGAINST* ALLOWING PERSONAL JURISDICTION OVER A PRODUCT MANUFACTURER BASED ON MERE AWARENESS THAT ITS PRODUCT COULD END UP IN A GIVEN STATE

This Court has rejected an "awareness" test on the ground that if forseeability alone were the criterion for *in personam* jurisdiction, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process." *World-Wide Volkswagen*, 444 U.S. at 296. Nevertheless, the lower court upheld the exercise of personal jurisdiction based solely on the mere knowledge that a product *could* end up in particular state. Contrary to the New Jersey Supreme Court's suggestion, the "new reality" of interstate and international commerce is not a reason to endorse but rather to reject this extremely watered-down version of the stream of commerce theory.

The implications of the decision below extend far beyond this case and are not difficult to grasp. Consider, for example, a pharmaceutical company that manufactures and distributes drugs for sale solely in Canada. Such a company might reasonably

expect that U.S. citizens will purchase those drugs in Canada and carry them back to their home states. Under the lower court's approach, all such "gray market" goods could serve as a basis to hale a foreign manufacturer into U.S. state court. Indeed, under the lower court's theory, even authorized international distribution—such as through the sale of Japanese-made electronics in foreign duty-free shops—would justify state court jurisdiction over the manufacturer given the forseeability that those goods might eventually make their way to the United States.

An overly broad awareness-based test can also make it easy for plaintiffs to circumvent the rule requiring the jurisdictional focus to remain on the defendant's *own* forum contacts and forbidding attribution of the contacts of other entities, including corporate affiliates. See page 19 & n.5, *supra*. That erroneous approach can lead to the improper assertion of personal jurisdiction over foreign parent companies based on the actions of their domestic subsidiaries. See, *e.g.*, *Anderson* v. *Dassault Aviation*, 361 F.3d 449, 452-53 (8th Cir. 2004). In this case, of course, the distributor of petitioner's shear machine, MMA, was wholly independent. But where a foreign parent company establishes a subsidiary with the knowledge that the subsidiary will place goods into the national market, the parent could be haled into state court under the permissive approach adopted by the lower court, which would effectively attribute the forum contacts of the subsidiary to the parent simply on the ground that the parent was aware of and benefited from such contacts.

Respondents seek to justify that result by pointing to the supposedly "new reality" of the modern economy. But as petitioner correctly points out, the sale of machinery in this case is, at bottom, little different from the sales of machinery and other goods considered over the past half century by this Court. Pet. Br. 31-33.[8] That said, it is certainly true that the changing nature of the national and global economy has brought with it expanded methods and modes of distributing products. Because the world is now "flat," see T. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2006), more commerce occurs without the benefit of a single major distributor, and new and supplemental mechanisms for distributing goods and services have proliferated. Indeed, with eBay, Amazon Marketplace, Craigslist, and the like, any independent purchaser (whether an individual or small business) can readily become an independent distributor in its own right.

A manufacturer who sells products in today's economy is surely aware, then, that its products can be resold via such new distribution networks and marketplaces. As a result of these ubiquitous new distribution mechanisms, under the logic of the lower

[8] Similarly, the history of product franchising and national distribution arrangements in the United States stretches back to the 1850s, well before *Pennoyer* v. *Neff*, 95 U.S 714 (1878), when the Singer Sewing Machine Company devised a novel system for selling its machines through "regional agents" that were "responsible for collection" of the purchase price or rental fees. 1 W.M. GARNER, *supra*, § 1:8, at 15-16; see also *Wilcox & Gibbs Sewing-Machine Co.* v. *Ewing*, 141 U.S. 627, 637 (1891) (upholding franchisor's right of termination of sales agent).

court's opinion universal jurisdiction might be exercised over any company anywhere in the world. And because in today's global economy smaller companies can obtain a broader dissemination of their products through novel distribution agreements and technological advances, the lower court's rationale will surely sweep up small companies as well as large multinationals.

In sum, advances in communication and transportation have made it *easier* not only to sell goods, but also to *resell* goods. And a manufacturer's contacts with the resale market—absent direct efforts to exploit that market—are inherently more attenuated than its contacts with the original purchaser. In today's economy, then, where goods can readily make their way across the globe, it is even more crucial that the personal jurisdiction inquiry focus carefully and exclusively on the *defendant's* direct actions in relation to the *forum* state. Ignoring that guiding principle, the lower court based personal jurisdiction on petitioner's contacts with the nation as a whole, rather than with the forum state. This Court should take this opportunity to reject that interpretation and reaffirm the territorial limitations that have always restricted a state's adjudicatory power.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted.

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November 19, 2010

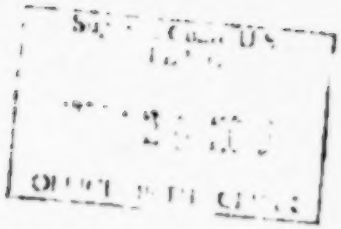
APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC. LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation

Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Niro Inc.

Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.



No. 09-1343

IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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December 2010

QUESTION PRESENTED

Whether the Due Process Clause permits a state court to exercise personal jurisdiction over an alien corporation that has aimed the marketing of its product equally at that state and other states, where the alien corporation's actions have resulted in injury within the state.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents the interests of its members in litigation and as amicus curiae.

Public Citizen has long worked to maintain the availability of the courts to provide remedies to individuals who suffer injuries caused by defective products. The ability of the courts to provide such remedies may be thwarted by unduly narrow conceptions of the circumstances in which courts may exercise authority over those who cause injuries within their territorial jurisdiction. In this case, the contention of petitioner J. McIntrye Machinery, Ltd. (McIntyre) that an alien corporation may engage in a concerted program of marketing directed at all fifty states without being subject to jurisdiction in *any* state (or at least not in 49 of them) when its products cause injury reflects precisely such a crabbed view of the scope of jurisdiction, and fails to give effect to the substantial interests of plaintiffs in having a forum in which to vindicate their rights under applicable law. Public Cit-

[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

izen therefore submits this brief to urge the Court to ensure that injured parties' interests in reasonable access to judicial remedies and the states' interests in providing such remedies are not sacrificed on the basis of unwarranted claims of unfairness to defendants who do business throughout the country.

STATEMENT

The briefs of the parties and the opinions below show that the dispositive facts are clear and undisputed, whatever disputes may remain around the margins. McIntyre is in the business of manufacturing and selling equipment for a specialized market, the metal recycling industry, including shearing machines for which it charges tens of thousands of dollars each. To serve the market for its products in the United States, McIntyre over time designated a series of exclusive distributors who, with McIntyre's assistance, sought to promote sales throughout the country—including New Jersey, where several of McIntyre's machines were sold.

At the relevant time here, McIntyre's U.S. distributor was McIntyre Machinery America, Ltd., a company that happened to be located in Ohio. A buyer in New Jersey ordered one of McIntyre's machines, which McIntyre shipped to the United States in response to the order as relayed by the distributor. The price of the machine was approximately $25,000, which McIntyre received (less the distributor's commission). As a result of the New Jersey customer's use of the machine for its intended purpose in the location to which McIntyre's U.S. distributor sent it, a citizen of New Jersey was seriously injured, allegedly because of the machine's defective design.

SUMMARY OF ARGUMENT

Sustaining the New Jersey courts' assertion of jurisdiction over McIntyre in this case is fully consistent with the principles that have governed this Court's personal jurisdiction doctrine since its decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *International Shoe*'s core requirement that a defendant have the minimum degree of contact with the forum state necessary to render the assertion of jurisdiction over it consistent with "traditional notions of fair play and substantial justice," *id.* at 316, is amply satisfied when, as in this case, an alien defendant has engaged in commercial conduct directed at creating a market for its products nationally, and that conduct has given rise to an injury within the bounds of the forum state.

This Court's decisions have emphasized that the consideration of "minimum contacts" is not a purely mechanical or quantitative analysis, but one that looks to whether the defendant's forum-directed activities are sufficient, in light of the state's legitimate interests in subjecting the defendant to jurisdiction. In other words, the minimum contacts analysis is not purely defendant-centric: its focus is on fairness to the defendant in relation to the forum state's interests, including its interests in protecting its residents. Here, and in similar cases involving alien corporations that market their products throughout the United States, the states have powerful interests in regulating the safety of those products and in providing remedies to residents whose injuries are the direct result of the corporations' forum-directed conduct. By contrast, an alien corporation has little or no legitimate liberty interest in *not* having to appear in any

particular state where its efforts to serve the national market have resulted in injury.

Accordingly, subjecting an alien corporation to personal jurisdiction in the circumstances here fully accords with notions of fair play and substantial justice. McIntyre embarked on a course of conduct aimed at serving the market for scrap-metal shearing equipment throughout the United States; it shipped a large and expensive piece of equipment for which it received a substantial payment in response to an order from a New Jersey buyer who responded to its national marketing efforts; and the use of the equipment by the New Jersey customer resulted in substantial injuries to a worker in New Jersey, allegedly as a result of McIntyre's defective design. These circumstances create a "relationship among the defendant, the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), that is ample to support the exercise of jurisdiction. Similar circumstances, moreover, are generally held to support jurisdiction in the emerging field of e-commerce. Of course, concerns of fairness and due process may preclude the assertion of personal jurisdiction in cases in which the occurrence of injury within the forum state is, from the defendant's standpoint, a fortuity unrelated to any actions that it could reasonably have understood would subject it to jurisdiction in that state. But this is not such a case.

ARGUMENT

I. States Have Strong Interests in Exercising Jurisdiction Over Alien Corporations Whose Business Activities Cause Injuries to The States' Residents and Workers.

Since this Court's decision in *International Shoe*, it has been settled that personal jurisdiction does not turn on the physical presence of a defendant in the forum state: "Jurisdiction ... may not be avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Rather, as the Court has repeatedly stated, the limits on the power of a state court to exercise personal jurisdiction over an out-of-state defendant are supplied by considerations of due process, under which a defendant must "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (citation omitted). Put another way, there must be "such contacts of the [defendant] corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.* at 317.

Although the requisite contacts must be the result of each defendant's own conduct, *see, e.g., Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980), *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), minimum contacts analysis does not focus on only the defendant's interests. Nor is the determination of minimum contacts a matter of "[m]echanical or quantitative evaluations of the defendant's activities in the forum." *Shaffer v.*

Heitner, 433 U.S. at 204. Rather, because the question is whether the defendant's activities are such as to make the exercise of jurisdiction over it *reasonable*, those activities must be considered in relation to the relevant interests of the forum state. As the Court put it in *International Shoe*, "Whether due process is satisfied must depend ... upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 319.

The Court elaborated on the significance of forum interests in determining whether a defendant's contacts suffice to render the exercise of jurisdiction fair and reasonable in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980):

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court*, ... 436 U.S. [84,] 92 [(1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. [at] 211, n.37 ...; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. California Superior Court, supra*, 436 U.S., at 93, 98.

As the Court's citations in *World-Wide Volkswagen* indicate, consideration of state interests in determining whether a defendant's contacts are sufficient to make it fair to subject it to jurisdiction has been a persistent theme in the Court's personal jurisdiction decisions. Subsequent decisions have reinforced the theme. For example, in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), the Court observed that "the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Id.* at 775-76 (citing *World-Wide Volkswagen*, 444 U.S. at 292, and *McGee*, 355 U.S. at 223). Similarly, in *Burger King*, the Court emphasized the importance of the state's interests in determining whether the defendants' actions satisfied *International Shoe*'s "minimum contacts" criterion, *see* 471 U.S. at 473-74, and it explicitly stated that consideration of such interests may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477 (citing *Keeton*, 465 U.S. at 780, *Calder v. Jones*, 465 U.S. 783, 788-789 (1984), and *McGee*, 355 U.S. at 223-23).

The state interests implicated by the type of contact at issue here—where the defendant has targeted its sales of an allegedly defective piece of equipment at a national market including the forum state, and where injury has resulted in that state—are interests that this Court has traditionally recognized as very powerful. To begin with, a state has an undoubted interest in protecting both its residents and its workforce against serious injury. *See, e.g., Allstate Ins. Co.*

v. Hague, 449 U.S. 302, 313-14 (1981). Tort actions such as the one at issue here serve that interest by imposing standards of care (including, for example, the duty not to design or manufacture a defective product) on those who supply equipment used by workers within the state.

This Court has also recognized that states have a powerful interest in providing their residents compensation for injuries that they have suffered, and a corresponding interest in providing a forum in which residents may seek such remedies. As the Court stated in *McGee*, "It cannot be denied that [a state] has a manifest interest in providing effective means of redress for its residents .... These residents would be at a severe disadvantage if they were forced to follow [a defendant] to a distant State in order to hold it legally accountable." 355 U.S. at 223. Similarly, the Court has said it is "beyond dispute" that a state "has a significant interest in redressing injuries that actually occur within the State." *Keeton*, 465 U.S. at 776. In *Calder*, the Court found that the forum state's interest in remedying the "effects" of torts directed at its residents supported a finding that the defendant had sufficient minimum contacts. *See* 465 U.S. at 789. And in *Burger King*, the Court said that "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." 471 U.S. at 473.

Moreover, the Court recognized in *World-Wide Volkswagen* that the states have a "shared interest" in "furthering fundamental substantive social policies," and that the "interstate judicial system" as a whole has interests in the proper resolution of controversies. 444 U.S. at 286. Among those shared, inter-

state concerns is the common interest of the states in not allowing an alien corporation that has directed its actions toward an interstate market to evade responsibility for its actions in any of the states that make up that market. As the Court put it in *Burger King*, "where individuals 'purposefully derive benefit' from their interstate activities, ... it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." 471 U.S. at 474. The states thus have a powerful, shared interest in preventing a defendant from, as in this case, directing contact at all of them, but seeking to avoid being held accountable for its actions in any of them.

II. An Alien Corporation That Has Marketed Its Products Nationwide Has No Significant Liberty Interest in Avoiding Jurisdiction in a State Where Its Actions Have Resulted in Injury.

As this Court has explained, the due process requirement of minimum contacts to sustain the exercise of personal jurisdiction over a nonresident defendant exists to protect "individual liberty." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). As against the substantial interests supporting the exercise of personal jurisdiction over an alien corporation whose targeting of an interstate market including the forum state has caused injury within the state to a resident of the state, the alien corporation has relatively insubstantial (if any) legitimate "liberty interests" in avoiding suit.

To be sure, this Court has recognized that a defendant has an interest in not being subjected to personal jurisdiction "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475. Thus, the Court held in *World-Wide Volkswagen* that a corporate defendant who took no action aimed at serving the market in a state could not be subjected to jurisdiction there based on a consumer's isolated, unilateral action in moving the defendant's product there. 444 U.S. at 295-96; *accord Asahi Metal Indus. Co. v. Super. Ct. of Calif.*, 480 U.S. 102, 110-12 (1987) (opinion of O'Connor, J.). Similarly, the Court has stated that "'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" *Kulko*, 436 U.S. at 93-94 (quoting *Hanson v. Denckla*, 357 U.S. at 253).

Cases such as this one, however, do not involve contacts with the forum state that are merely "fortuitous" and thus not properly attributable to the defendant's own conduct and choices. Rather, in the words of this Court in *Hanson v. Denckla*, 357 U.S. at 253, McIntyre "purposefully avail[ed]" itself of the "privilege" of doing business with the forum state when it chose to sell its products through a distributor that targeted a national marketplace including New Jersey. That those activities resulted in a sale to a New Jersey customer (which in turn led to the injury giving rise to the action) was by no means "completely adventitious as far as [the defendant] was concerned." *Rush v. Savchuk*, 444 U.S. at 329. Rather, it was exactly the type of transaction that McIntyre intended to foster, in a jurisdiction that fell within the bounds of the market McIntyre sought to serve. No decision of this Court holds that a corporation has a "liberty

interest" in avoiding jurisdiction in such circumstances.

Moreover, the assertion of jurisdiction in such circumstances is entirely consistent with this Court's view that the rules governing personal jurisdiction provide "a degree of predictability ... that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. A company that chooses to designate a distributor to serve a market that includes some or all of the states of the Union can easily anticipate that it will be liable to suit in one of those states if its products cause injury there, and it can structure its conduct accordingly. Among other things, it can, as this Court suggested in *World-Wide Volkswagen*, "act to alleviate the risk of burdensome litigation by procuring insurance," *id.*—a step that McIntyre in fact took with respect to its American market, *see* Resp. Br. 4-5—and it can "pass[] the expected costs on to customers, or, if the risks are too great, sever[] its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297.

Moreover, any assertion that McIntyre or similarly situated alien corporations have a significant interest in avoiding the burdens of defending in one particular state as opposed to another is unconvincing. For more than half a century, this Court has acknowledged that "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for

disputes relating to such activity." *Burger King*, 471 U.S. at 474 (quoting *McGee*, 355 U.S. at 223).

From the standpoint of an alien corporation, moreover, it is difficult to see a difference of constitutional magnitude between the inconveniences of litigating in one American jurisdiction as opposed to another. To put it more concretely, New Jersey is no more or less convenient for McIntyre than Ohio, a jurisdiction where it could hardly proffer a reasonable claim that it lacked sufficient contacts to support personal jurisdiction in a lawsuit arising out of its sales of equipment to the American market. (Of course, it does not appear that McIntyre has admitted in this Court that it would even be amenable to suit in Ohio, where its American distributor was located. But if McIntyre's position is that it could not be sued even there, its claim would be still more untenable, amounting to the assertion that it had a liberty interest in avoiding litigation *anywhere* in the United States despite its substantial activities directed at maximizing its sales here.)

Indeed, as some scholars have observed, from the international perspective of an alien defendant, our nation's political subdivisions are largely irrelevant:

> In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in musical comedy, where the corn grows as high as an elephant's eye and wind goes sweeping across the plain. But it is just as mythical as Ruritania. It fields no army, sails no navy, prints no stamps and coins no money. Most important of all, it has no diplomatic relations and can conclude no treaties. In

> short, it lacks every single attribute of a 'state' for international purposes.

Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hastings L.J. 799, 813 (1988).[2] Thus, "[h]ow we choose to distribute our judicial business by either geography or by subject matter is our own business and, further, is a matter as to which Germany and Japan are profoundly disinterested." *Id.*

This is not to suggest, as some have, that the due-process-based minimum contacts doctrine be replaced with respect to alien defendants either by a doctrine focusing entirely on national contacts, *see id.*, or by some other construct altogether, *see, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1 (2006).[3] It is simply to recognize that an alien corporation has a minimal liberty interest, if any, in being subject to jurisdiction in one state rather than another when its commercial conduct has been directed without distinction towards both or, as here, towards all.

[2] New Jersey may be less fabled in song than Oklahoma (*but cf.* Bruce Springsteen, *Atlantic City* (1982)), but it is no more or less distinct from the United States as a whole from the standpoint of aliens and foreign states.

[3] A true "national contacts" approach would allow contacts specifically confined to, say, Alaska to support personal jurisdiction in Florida. The Court need not go so far to find that an effort to serve a national or multistate market that includes the forum state establishes minimum contacts with that state in a case arising out of an injury that occurs in the state as a result of the defendant's commercial activity.

III. New Jersey's Assertion of Personal Jurisdiction Over McIntyre Accords With This Court's Jurisprudence.

A realistic consideration of the interests at issue within the framework of this Court's minimum contacts jurisprudence can lead to only one result: When, as in this case, an alien corporation has, either directly or through a distributor, sought to serve a market that includes a particular state, it is properly subject to personal jurisdiction in that state when its commercial activity causes injury there. Personal jurisdiction is proper regardless of whether the alien corporation has singled that state out for particularly targeted marketing efforts; activity directed at a multistate market that includes the forum state is sufficient.

Given that this result follows so naturally from the general principles articulated in the Court's decisions and from the interests that the Court has recognized on both sides of the equation, it is not surprising that the Court has, more than once, explicitly stated that activity such as that involved here satisfies the minimum contacts standard. In *World-Wide Volkswagen*, for example, the Court stated straightforwardly that "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." 444 U.S. at 297 (emphasis added).

Similarly, in *Asahi*, Justice O'Connor's opinion acknowledged that minimum contacts are present

where an alien manufacturer has engaged in "conduct ... indicat[ing] an intent or purpose to serve the market in the forum State," including "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." 480 U.S. at 112. Nothing either in Justice O'Connor's opinion or in logic suggests that the defendant's undertaking with its distributor to "serve the market in the forum State" must specifically identify each state served, as opposed to a broader multistate or national market including the forum state. Justice Brennan's opinion in *Asahi* similarly would find the minimum contacts standard satisfied under these circumstances by "the regular and anticipated flow of products from manufacture to distribution to ... sale," *id.* at 117, as would Justice Stevens' opinion, *see id.* at 122.[4]

Likewise, in *Keeton*, the Court emphasized that the defendant had developed a product (there, a publi-

[4] It is therefore not necessary for the Court in this case to choose between the so-called "stream of commerce plus" standard that some have derived from Justice O'Connor's opinion and the standard set forth in Justice Brennan's opinion. Indeed, the label "stream of commerce" does not seem particularly apt or helpful as applied to this case, insofar as it conjures up an image of a defendant simply casting a product adrift and relying on chance to determine where in the global economy it may wash ashore. The conduct at issue in this case is much more directed: The defendant, far from simply releasing its product into an undifferentiated stream of commerce (or, as in *Asahi*, selling it to someone to be incorporated in another product that will be marketed at the sole discretion of the second manufacturer), has delegated a distributor to develop, and act as its exclusive sales agent in, a designated market to which the defendant then ships its product in response to orders generated as a result of this concerted plan to serve the relevant market.

cation) "aimed at a nationwide audience." 465 U.S. at 781. The Court found "no unfairness in calling [the defendant] to answer" for its conduct wherever in that nationwide market a substantial sale of its product caused an injury. *Id.* So, here, where McIntyre's efforts to serve a nationwide market led to a lucrative sale of its product to New Jersey, which in turn resulted in a serious injury there, there is no unfairness in calling it to answer for its conduct in a New Jersey court.

Applying the principles of this Court's decisions, lower state and federal courts have regularly held that a state may (consistently with both *World-Wide Volkswagen* and each of the opinions in *Asahi*) exercise personal jurisdiction over an alien or out-of-state corporation that, through a distributor, targets a multi-state or national market including the forum state, when that commercial activity has resulted in injury within the forum state.[5] As the Eighth Circuit put it

[5] A by no means exhaustive list of decisions fitting this pattern (many of which cite other, similar decisions) includes. *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir 2000); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed Cir 1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F 2d 1534 (11th Cir. 1993); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986); *GSK Technologies, Inc. v. Schneider Elec., S.A.*, 2007 WL 788343 (E.D. Tex March 14, 2007); *Kaplan v. DaimlerChrysler, A.G.*, 99 F. Supp. 2d 1348 (M.D. Fla. 2000); *Stokes v. L. Geismar, S.A.*, 815 F. Supp. 904 (E.D. Va. 1993); *Felty v Conaway Processing Equip. Co.*, 738 F Supp. 917 (E.D. Pa. 1993); *Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130 (M D. Pa. 1978); *Le Manufacture Francaise des Pneumatiques Michelin v. Dist. Ct.*, 620 P.2d 1040 (Colo 1980),

(*Footnote continued*)

in one such opinion, "it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in [the plaintiffs'] home states." *Barone*, 25 F.3d at 615.

Recent cases involving the emerging field of e-commerce reflect a similar approach to the jurisdictional consequences of deliberate efforts by out-of-state corporations to serve national or multi-state markets. As the Seventh Circuit recently concluded in one such case, "due process is not violated when a defendant is called to account for the alleged consequences of its deliberate exploitation of the market in the forum state." *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 423 (7th Cir. 2010). There, the court found that an internet company that had intentionally limited its physical presence to Arizona had minimum contacts with Illinois because of its targeting of a national market, including Illinois. *See id.* at 427.

As the *GoDaddy* decision illustrates, the "exploitation of the market in the forum state" that makes the exercise of personal jurisdiction fair and reasonable is not limited to circumstances where the defendant *specifically* targets its marketing at a particular state. Although there was "no evidence that GoDaddy specifically targets Illinois customers in its advertising," the court held that "what mattered," as in this Court's decision in *Keeton*, was that the defendant "purposefully directed its business activities toward [the forum state] just as it had toward all other

Etchieson v Central Purchasing, LLC, 232 P.3d 301 (Colo. Ct. App. 2010); *Thompson v. Nishimoto Trading Co.*, 689 N.Y.S.2d 858 (Sup. Ct. 1999).

states." *Id.* at 428. That the forum state was "a place of no *particular* interest" to the defendant, *id.* (emphasis added), the court held, did not make it unfair to hale the defendant into court there because the claim was related to the forum-targeted activity, which provided the necessary minimum contacts. *See id.* at 429-31.[6]

The *GoDaddy* case also illustrates that where a defendant has sought to serve a commercial market that includes the forum state, the defendant's lack of control over (or even interest in) the location of particular customers who respond to its marketing efforts does not mean that the forum state's effort to exercise jurisdiction is contrary to this Court's condemnation of jurisdiction based on "unilateral" actions of persons other than the defendant. *See id.* at 428-29. The conduct of the defendant itself that is essential to the exercise of personal jurisdiction can be found in its establishment of a mechanism to distribute its products in a market including the forum state. Even when it exercises no further choice about what particular customers within that market it will serve, its contacts with the forum "cannot fairly be described as random, fortuitous, or attenuated." *Id.* at 429.

[6] As courts have recognized, the matter is different when a defendant's internet activity is limited to speech that, while it may be accessible anywhere in the nation (or the world) is not accompanied by efforts by the defendant to avail itself, directly or indirectly, of the benefits of the commercial marketplace in the forum state and is not otherwise targeted at that state. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

IV. Limiting the States' Exercise of Personal Jurisdiction Over Cases Such as This One Would Have Significant Adverse Consequences.

Declining to permit the exercise of jurisdiction over an alien or out-of-state corporation that has targeted the forum state as part of a nationwide or multistate market would have severe negative consequences for the administration of justice. It would reward artifices designed to allow exploitation of the benefits of doing business with residents of the state, while avoiding the consequence of being called to answer there for any wrongs arising out of that forum-directed conduct. As one court recently explained, holding that the use by alien corporations of distribution chains aimed at regions or the entire nation rather than at particular states did not establish minimum contacts with any of the targeted states "could allow any foreign-nation manufacturer that marketed and sold its products throughout the United States to avoid being haled into a state court anywhere in the country, thus impairing the states' ability to protect their respective citizens from injury from defective products, simply by refusing to tailor its product specifically to any state." *Etchieson v. Central Purchasing, LLC*, 232 P.3d at 307.

Denying personal jurisdiction here would also unfairly relegate the plaintiffs in this case, and potentially large numbers of other cases, to the choice of suing in a distant and inconvenient domestic forum (assuming that the alien corporation's contacts with the state where its domestic distributor was located would subject it to jurisdiction there), or to the daunting and doubtful prospect of pursuing litigation overseas. The

problem would be magnified if, as in this case, the alien corporation used a thinly capitalized and ultimately insolvent domestic corporation as its distributor, thus impairing the ability of potential plaintiffs to find a domestic defendant who could satisfy their claims in a more accessible forum.

Holding that a physically absent defendant's successful effort to serve a nationwide marketplace does not suffice to establish personal jurisdiction in particular states where customers have responded to the defendants' marketing efforts could also impair efforts to provide reasonable remedies for consumers in the burgeoning area of e-commerce. In that arena, many defendants could claim (as does McIntyre) that they neither knew nor cared which states particular customers hailed from, even though (like McIntyre) they set up a marketing method calculated to reach a national market.[7] The Court should not develop new limitations on personal jurisdiction that encourage efforts to evade legal accountability.

On the other side of the coin, nothing in a decision recognizing the availability of personal jurisdiction over an alien corporation in the circumstances of this

[7] Narrowing personal jurisdiction doctrine to preclude jurisdiction based on a defendant's effort to serve a multistate market including the forum state would call into question the emerging consensus in the e-commerce realm that commercially interactive websites generally support the exercise of personal jurisdiction in the plaintiff's home state if that state was part of the market served by the site. By contrast, mere internet speech not aimed at availment of the benefits of commercial activity in the forum state generally does not support personal jurisdiction. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also supra*, n.6.

case threatens to lead to unfair or burdensome forum-shopping by plaintiffs. Absent the more extensive contacts necessary to give rise to general personal jurisdiction, the availability of personal jurisdiction will remain limited to circumstances where the defendant took actions aimed at serving a market including the forum state *and* the claim at issue has a relationship to the forum-directed activity. Here, for example, the claim involves the occurrence in the forum state of an injury to a resident of that state—an injury that, in turn, was the result of the sale of the defendant's product to a company residing in the forum state.[8] A lawsuit brought in the plaintiffs' home state on the basis of an injury that occurred there can hardly be described as forum-shopping. And in any event, despite the widespread acceptance among the lower courts of the availability of personal jurisdiction in similar suits over the past several decades, newly reported data shows that the number of claims brought by domestic plaintiffs against alien defendants in the federal courts has (in striking contrast to the total number of lawsuits), *declined* in recent years—hardly evidence of a rash of forum-shopping. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596280##.

In the end, plaintiffs here seek to hold a defendant who successfully targeted a market including the fo-

[8] In this respect, the exercise of specific personal jurisdiction here is entirely unlike the North Carolina courts' exercise of general personal jurisdiction in *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76.

rum state accountable in the courts of that state for an injury that occurred there as a direct result of the sale of the defendant's product there. As this Court said in *Keeton*, there is nothing unfair about that. 465 U.S. at 781. The "traditional notions of fair play and substantial justice" that have animated this Court's personal jurisdiction decisions since *International Shoe*, 326 U.S. at 316, strongly support permitting the plaintiffs to sue in their chosen forum.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed, and the case remanded for further proceedings on the merits.

Respectfully submitted,

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No. 09-1343

IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY LTD.,

Petitioners,

v.

ROBERT NICASTRO, ET UX.,

Respondents.

On Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE WORKERS' INJURY LAW & ADVOCACY GROUP IN SUPORT OF RESPONDENTS ON THE MERITS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG has substantial common interests in ensuring that the rights of injured workers are not diminished further by their inability to bring a third party foreign defendant to Court in the jurisdiction where the injury occurs and/or where the injured worker resides. When a foreign defendant purposefully avails itself of the privilege of conducting activities within the forum state, then that foreign defendant must be subject to the jurisdiction of the Court in that forum state.

Workers' compensation is a form of insurance that provides medical care and compensation for workers who are injured in the course of employment, while abrogating the worker's right to sue their employer for the tort of negligence. While schemes differ between jurisdictions, provision can be made for weekly payments in place of wages, compensation for economic loss (past and future), reimbursement or payment of medical and like expenses, and benefits payable to the dependents of workers killed during employment. Cash benefits are established by state formulas with maximum benefit levels. The benefits are administered on a state level, primarily by the state department of labor.

Workers' Compensation Acts across the country are a

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission

heavily bureaucratic, adversarial system that generally short change injured workers. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006). To the extent that workers' compensation rate reductions have occurred, such rate reductions come at the expense of the injured workers, because lawmakers slash benefits and push many of the injured workers out of the system and into other social programs, such as social security disability, Medicare, Medicaid, and group health insurance. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006).

"Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation." A. Widman, Workers' Compensation A Cautionary Tale, p. 3 (2006).

"Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the worker or the worker's dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of workers and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts." 6-100 Larson's Workers' Compensation Law § 100.01.

"The operative fact in establishing exclusiveness [of jurisdiction] is that of actual coverage, not of election to claim compensation in the particular case." 6-100

Larson's Workers' Compensation Law § 100.01. Even if the worker has never made application for compensation, the worker's right to sue his or her employer at common law is barred by the existence of the compensation remedy. *Sedore v. Sayre*, 119 N.Y.S.2d 204 (Sup. Ct. 1953). If the Compensation Commission has made a valid and unappealed award for compensation, this is res judicata on the issue of coverage, and is binding on the court in which the worker attempts to bring his or her common-law suit. *Riggins v. Stong*, 238 A.D.2d 950, 661 N.Y.S.2d 170 (1997); *Ogino v. Black*, 304 N.Y. 872, 109 N.E.2d 884 (1952).

In 1972, the Nixon Administration appointed a bi-partisan commission that produced a unanimous Report of the National Commission on State Workers' Compensation Laws. The Commission declared that "[t]he inescapable conclusion is that State workers' compensation laws in general are inadequate and inequitable. The report listed nineteen 'essential recommendations,' all of which focused on expanding benefits to workers: eight recommendations dealt with expanded coverage; nine with increased disability benefits; and two with improvements to medical and rehabilitation benefits." McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657 (1998), n. 88, 89 (1998), citing, "The Report of The National Commission on State Workmen's Compensation Laws," Washington D.C., July 1972. The commission was made up of representatives from business, labor, insurance, the medical profession, academics, and the public. These recommendations were to further the following goals:

—Broad coverage of workers and of work-related injuries and diseases;

—Substantial protection against interruption of income;

—Provision of sufficient medical care and rehabilitation services;

—Encouragement of safety;

—An effective system for delivery of benefits and services.

"The Report of The National Commission on State Workmen's Compensation Laws," Washington D.C., July 1972.

The rights of injured workers continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured workers requires vigilant protection. The right to sue is a cherished right – an inalienable right. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured workers when the *quid pro quo* establishing workers' compensation systems were originally established. If foreign defendants, who purposely avail themselves of the United States market, avoid jurisdiction in the forum where the injury occurs, then workers across the country who sustain injures due to these defective products, will be denied complete justice.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF ARGUMENT

Each state devises its own workers' compensation system, and state statutes and court decisions guide most of the restrictions and requirements. While each state has its own laws, the following general concepts apply to most workers' compensation systems:

1) When a worker is hurt, workers' compensation is the exclusive remedy against an employer. Lawsuits against employers are generally not allowed. Although if another party causes the injury, such as the manufacturer of defective equipment, suits against this other party are still allowed except against foreign defendants who place defective goods in the stream of commerce in the United States and hide behind jurisdictional limitations. Domestic and agricultural workers are usually excluded, as are some federal workers. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998).

2) "Two types of compensation are generally allowed: medical benefits and disability benefits (for lost earnings, divided by duration and severity: temporary, permanent, partial, total). Some programs provide limited death benefits. Id. at n. 37-39. No compensation is allowed for pain and suffering." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

3) In the case of some disabilities, state lawmakers enact by statute a fixed schedule of benefits (so much for an eye or leg based on a fixed number of weeks). These schedules ignore actual or projected economic loss. 1-1 Larson's Workers' Compensation Law Scope.

4) "If a worker is injured, [she or he] files a claim with the state workers' compensation agency that oversees administration of the system. Almost all states require that the injured worker notify the employer promptly of

any injury. Usually an informal resolution procedure begins. Many times, however, the claim will be contested in some way, and at this point a more formal adjudicative administrative process begins before the state's workers' compensation board." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

5) "Once the board reaches a decision, a court may only review that decision on questions of law. In other words, an administrative decision may not be appealed to a court purely on the grounds that the administrative court found certain facts to be right or wrong, i.e., a determination of type of injury or duration of benefits." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

6) "Generally, employers pay premiums to an insurance company or self-insured fund, and, when a worker is injured, [she or he] receives compensation from the insurance company or fund." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

7) "There are three mechanisms for administering workers' compensation benefits: a purely state-run system, a state-run system that competes with private insurers, and a purely privately run system. The trend is toward more privately-run systems." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

Workers' compensation benefits generally are inadequate using the standard of two-thirds gross wage replacement and policy solutions should be tailored to overcome the inadequate remedies available to the injured worker, the employers, the insurance companies, and ultimately the consumers, who absorb the costs of injuries through the purchase price increase of the products. Comparing the outcomes for injured workers with those of their uninjured counterparts provides a simple

and understandable measure of actual wage loss. By allowing the injured worker to pursue an action against a foreign defendant who places a defective product in the stream of commerce is a logical and cost effective method of equalizing the compromises to which the injured worker, the employer, the insurance carrier, and ultimately the consumer, must adhere. Such a policy will promote equality among the parties, and adhere to the workers' compensation bargain between the injured worker, the employer, and the insurance company. Due process and justice will be served only when the parties are allowed to hold the party liable for the wreckage responsible in the local forum where the injury occurred.

If this Court precludes jurisdiction against foreign defendants who purposely avail themselves of the United States market, then workers across the country who sustain injures due to these defective products, will be denied complete justice. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured workers when the *quid pro quo* establishing workers' compensation systems were originally established. Furthermore, with the *quid pro quo* bargain between the workers and the employers questioned due to the continuous legislative reduction in workers' compensation benefits, the natural progression of commerce cannot be allowed to further deteriorate the rights of the injured workers. Furthermore, the employers, insurance companies, and ultimately the consumers, will be excessively burdened when they must bear the cost of the inability to sue foreign defendants in the United States in a local forum and thereby must absorb the total loss to the United States work force incurred as a result. Additionally, the foreign defendants must be liable for injuries due to their defective products so that the manufacturers in the United States operate on a level playing field with equal liabilities and responsibilities for their

defective products. Constitutional challenges to the *quid pro quo* are mounting at the state level with the politicized and legislated reduction in workers' compensation benefits and/or deforms in the workers' compensation system occurring since 1990, thus the subtraction of even more normally available and previously contemplated tort claims is unconscionable—this is exactly what will occur if jurisdiction is denied.

ARGUMENT

I. PURPOSEFUL AVAILMENT OF THE MARKET OF THE UNITED STATES AS A WHOLE, WHICH CREATES GENERAL JURISDICTION OVER FEDERAL CLAIMS, ALSO CREATES SPECIFIC JURISDICTION IN A STATE IN WHICH THE HARM OCCURS AS A RESULT OF PURPOSEFUL AVAILMENT OF THE NATIONAL MARKET

A. HISTORICAL PURVIEW OF WORKERS' COMPENSATION

This Court, by granting review in these cases in tandem, has signaled a major doctrinal review which impacts the ability of the injured worker to obtain justice due to a defective product placed by a foreign manufacturer in the stream of commerce in the United States. We urge the Court to consider the rights of the injured workers in our great country when it contemplates this doctrinal review. As the New Jersey Supreme Court stated, "trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State."

"Workers' compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium

of insurance, whose premiums are passed on in the cost of the product." 1-1 Larson's Workers' Compensation Law Scope. Historically, workers' compensation is distinguishable from "strict tort liability in its basic test of liability, which is work connection rather than fault; in its underlying philosophy of social protection rather than righting a wrong; in the nature of the injuries compensated; in the elements of damage; in the defenses available; in the amount of compensation; in the ownership of the award; and in the significance of insurance." 1-1 Larson's Workers' Compensation Law Scope.

Throughout the United States, a typical workers' compensation state act provides: (1) compensation to be paid when a worker sustains an injury as a result of an accident, specific traumatic incident, or occupational disease that arose out of and in the course of the employment; (2) weekly indemnity benefits are limited to an annual maximum and are limited to two-thirds or less of the gross weekly wages earned the year before the compensable injury; (3) negligence and fault are generally irrelevant; (4) death benefits are limited and arbitrary maximum and minimum limits are ordinarily imposed; (5) medical providers are generally selected by the employer or the workers' compensation carrier; (6) the right to sue third persons whose negligence caused the injury generally remains, however, the proceeds usually are applied first to the reimbursement of the employer for the indemnity and medical compensation paid for the injury and the balance reverts to the injured worker; (7) in some jurisdictions the weekly wage benefits are limited to a maximum number of weeks regardless of the continuing disability; and (8) indemnity benefits paid to an injured worker are reduced by a statutory percentage when the worker violates a safety regulation or in alternative increased when an employer violates a safety regulation. 1-1 Larson's Workers' Compensation Law § 1.01. The employer is

required to obtain private workers' compensation insurance, state-fund insurance in some states, or "self-insurance"; thus the burden of liability does not remain upon the employer but passes to the consumer, since workers' compensation premiums, as part of the cost of production, will be reflected in the price of the product. 1-1 Larson's Workers' Compensation Law § 1.01.

"The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product." 1-1 Larson's Workers' Compensation Law § 1.03.

For example, if a worker works for an employer and the employer has safety rules requiring the worker to wear a safety harness. The worker wears the safety harness and through no fault of the employer or of the worker the harness, manufactured in a foreign country, fails, injuring the worker. The law allows recovery by the worker and allows the worker to sue the manufacturer of the safety harness that fails. When the worker is precluded from bringing an action against the manufacturer in the forum where the injury occurs, or where the worker resides, not only the worker is harmed but also the employer, the consumer, and the workers' compensation carrier who all bear the risk of the injury sustained by the worker.

The ultimate policy behind no-fault workers' compensation liability is the importance of providing, in the most effective manner, indemnity and medical benefits which an enlightened society would feel obliged to provide in

any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source. 1-1 Larson's Workers' Compensation Law § 1.03. To further limit the persons from whom an injured worker can recover and by limiting the injured worker's judicial forum, the rights of the injured worker would be further eroded.

The workers' compensation system contemplates that regardless of the precautions taken by an employer and by a worker, at some point a worker will sustain a work-related injury. At that juncture, the employer may be made to assume absolute liability for these injuries when they do occur. 1-1 Larson's Workers' Compensation Law § 1.03.

A workers' compensation system, unlike a tort recovery, does not pretend or intend to restore to the injured worker what he or she has lost. 1-1 Larson's Workers' Compensation Law § 1.03. The workers' compensation is a system of compromise between the worker and the employer, subject to the limitations discussed herein, and presumably enables a worker to exist following a work-related injury without being a burden to others. 1-1 Larson's Workers' Compensation Law § 1.03. For example, (1) the indemnity benefits paid to an injured worker terminate at the death of the injured worker, when the death is unrelated to the compensable injury by accident, specific traumatic incident, or occupational disease; (2) there are no damages paid for pain, for suffering, for loss of consortium, for loss of sexual potency, or for loss of child bearing capacity; and (3) there are limited damages for disfigurement and loss to an important internal organ. 1-1 Larson's Workers' Compensation Law § 1.03. However, it is important to understand that workers' compensation payments were never intended to equal actual loss. 1-1 Larson's Workers' Compensation Law §

1.03. These facts make it more critical for specific jurisdiction over a foreign defendant to be available to an injured worker, who is injured due to a defective product, manufactured by a foreign defendant, who makes purposeful availment of the market of the United States as a whole.

Likewise workers' compensation insurance's primary objective is to provide coverage for work related injuries and pass the expense of the injuries on to the consuming public in an orderly fashion. 1-1 Larson's Workers' Compensation Law § 1.03. Precluding specific jurisdiction over a foreign defendant denies not only the injured worker access to justice and equal protection under the law, but also denies access to justice and equal protection to the employer and the workers' compensation insurance company, who have paid benefits in the claim, and are thus allowed through a third party action to recoup their costs expended in these claims when the harm is caused by a defective product manufactured by a foreign defendant, who makes purposeful availment of the market of the United States as a whole. When all parties to the workers' compensation bargain are allowed the recovery from the source of the wreckage, and a chance to be made whole, when a third party foreign defendant is held responsible for the wreckage due to a defective product, then, and only then, will justice be achieved.

B. UNDER STATE WORKERS' COMPENSATION ACTS, THE INJURED WORKER IS GIVEN THE RIGHT TO PROCEED UNDER THE STATE ACT WHICH PROVIDES THE GREATER BENEFITS

It is generally held that an award under the Workers' Compensation Act of another state will not bar a proceeding under an applicable Act, unless the Act where the award was made was designed to preclude the recovery

of an award under any other Act, but the amount paid on a prior award will be credited on the second award. The development of the Magnolia, McCartin, and Thomas Doctrines have shaped the precedent for the greater recovery by an injured worker, all of which are subject to a credit on the second award.

The "Magnolia" Doctrine held on its facts that a prior Texas award of workers' compensation was a constitutional bar to a workers' compensation award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943), reh'g denied, 321 U.S. 801, 64 S. Ct. 483, 88 L. Ed. 1088 (1944).

The "McCartin" Doctrine provides that an award already had under the workers' compensation act of another state will not bar a proceeding under an applicable Act unless the Act where the award was made was designed to preclude the recovery of an award under any other Act, but the amount paid on a prior award will be credited on the second award. *Industrial Comm'n of Wis. V. McCartin*, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140, 169 A.L.R. 1179 (1947).

The "Thomas" Doctrine provides that the Full Faith and Credit Clause did not preclude successive workers' compensation awards, in as much as a state had no legitimate interest in preventing another state from granting supplemental compensation when that second state would have had the power to apply its own workers' compensation law in the first instance. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980); *Plater v. Kane Warehouse Co.*, 241 Md. 462, 217 A.2d 102 (1966) (worker regularly worked in Washington and Virginia, but was injured in Maryland; an award was made under the Maryland act, but worker also filed under

the Washington act, which provided greater benefits and was permitted to withdraw the Maryland claim and proceed under the Washington act); *D'Errico v. General Dynamics Corp.*, 996 F.2d 503 (1st Cir. 1993) (employer allowed an offset for benefits paid for the same injury under the Rhode Island Workers' Compensation Act when a later award was made under the Longshore and Harbor Workers' Compensation Act; it made no difference that the Rhode Island award was for disfigurement and the Longshore award for total disability since the same injury was involved); *Director, Office of Workers' Comp. Programs, U.S. Dep't. of Labor v. Boughman*, 545 F.2d 210, 178 U.S. App. D.C. 132 (1976) (worker was employed by a District of Columbia employer, but was injured while working in San Francisco; held that application of the District of Columbia workers' compensation statute, after California had already made an award, did not violate the full faith and credit clause of the constitution); *Sade v. Northern Natural Gas Co.*, 458 F.2d 210 (10th Cir. 1972) (worker injured in Nebraska, employed by an Oklahoma corporation, performing contract work with the defendant, a corporation with its main offices in Nebraska; worker entered into a compromise and settlement agreement with defendant, releasing all claims that he had against defendant as a result of the accident, then filed a workers' compensation claim in Oklahoma, which in turn was settled by the payment of a lump sum; held that despite claimant's acceptance of benefits under the Oklahoma workers' compensation law, he was not precluded from pursuing additional remedies he had under the laws of Nebraska, where the accident occurred, and therefore was entitled to bring this action for fraud); *Sager v. Royce Kershaw Co.*, 359 So. 2d 398 (Ala. Civ. App. 1978) (held that worker could pursue his suit in Alabama because he had, at least, a right of action to determine whether the Illinois payment was less than that

he would have recovered in Alabama, and because the possible issue of the settlement's rescission on the basis of a mutual mistake of fact had been presented); *Lowery v. Industrial Comm'n*, 123 Ariz. 108, 597 P.2d 1011 (Ct. App. 1979) (worker entitled to pursue his Arizona claim with his eventual recovery subject to an offset for benefits collected in New Mexico); *Kluttz v. Howard*, 228 Conn. 401, 636 A.2d 816 (1993) (worker, a North Carolina resident, was injured during the course of his employment in Connecticut, and he sought workers' compensation benefits in Connecticut; held that worker was eligible for Connecticut workers' compensation); *De Cancino v. Eastern Airlines*, 239 So. 2d 15 (Fla. 1970) (prior filing of a workers' compensation claim in New York held not to bar the filing of a claim and an award of benefits in Florida, where Florida did have jurisdiction over the accident, the only limitation being that credit would have to be given for any benefits received in New York); *Roadway Express, Inc. v. Warren*, 163 Ga. App. 759, 295 S.E.2d 743 (1982) (truck driver employed in Georgia, was injured in an accident in the course of his employment; obtained workers' compensation from Tennessee for four years, during which time he did not work for his employer; held that an award already received by a claimant under the compensation law of one state will not bar an award under an applicable act of another state, which has an adequate interest in the subject matter); *Goldblatt Bros., Inc. v. Industrial Comm'n*, 86 Ill. 2d 141, 56 Ill. Dec. 38, 427 N.E.2d 118 (1981) (an election of remedies held in Illinois to be permissible so long as there is no resulting threat of double compensation, the employer is not misled by the worker's act, and the doctrine of res judicata is not invoked); *Gulf Interstate Geophysical/Gulf Interstate Piping v. Industrial Comm'n*, 198 Ill. App. 3d 307, 144 Ill. Dec. 470, 555 N.E.2d 989 (1990) , reh'g denied (July 9, 1990) (worker twisted a knee while work-

ing on a pipeline in Indiana under a contract made in Illinois; paid temporary total disability and entered a settlement for permanent partial disability in Indiana; full faith and credit of the Indiana settlement was held to not bar a supplemental recovery under Illinois law since there was no "unmistakable language" in the Indiana Act to bar a supplemental recovery; Indiana settlement would be credited against any supplemental award in Illinois); *LeBlanc v. United Eng'rs & Constructors Inc.*, 584 A.2d 675 (Me. 1991) (various Maine residents who worked in New Hampshire had recovered workers' compensation benefits under that latter state's compensation act; they then sought further benefits pursuant to the Maine Act; award of benefits affirmed holding that Maine had a valid interest in protecting the interests of the resident workers); *Cramer v. State Concrete Corp.*, 39 N.J. 507, 189 A.2d 213 (1963) (award under the New York act does not bar the claimant's right to claim benefits under the New Jersey act).

"Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister state also is applicable." 9-141 Larson's Workers' Compensation Law § 141.02. Aside from the judge-made law allowing the worker choice of remedy, some compensation statutes give workers who have suffered injury as a result of the employer's intentional tort the explicit right to choose between tort and compensation remedies. In Kentucky and Maryland, for example, if the worker is injured as a result of the employer's deliberate intent to harm him or her, the workers' compensation statute permits the worker either to receive workers' compensation or to bring an action for damages against the employer. Ky. Rev. Stat. Ann. § 342.610(4) (Michie, LEXIS); Md. Code Ann., Lab. & Empl. § 9-509(d) (LEXIS). In other states, the worker does not even need to make such an election, but can pursue both remedies simulta-

neously. Among those jurisdictions, at least one allows the worker to keep both the compensation and any damages awarded. *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (application for and receipt of workers' compensation benefits does not preclude a common-law action for damages for an intentional tort, nor is the employer entitled to a set-off for the amount of compensation received by the worker). Other jurisdictions require that an offset be taken to avoid double recovery. See, e.g., *Gagnard v. Baldridge*, 612 So. 2d 732 (La. 1993) (worker is entitled to pursue both his or her remedy under the workers' compensation act and damages in a tort action for the intentional act of the employer. A worker injured by the intentional act of the employer need not risk the guaranteed benefits provided by the workers' compensation act, although the trial court must allow a credit against the civil tort judgment in an amount equal to the workers' compensation benefits paid).

C. ALLOWING SPECIFIC JURISIDICTION OVER A FOREIGN DEFENDANT WHO PLACES A DEFECTIVE PRODUCT IN THE STREAM OF COMMERCE ALLOCATES THE BURDEN AND RELATION OF HAZARD TO LIABILITY

Workers' compensation in America was seen as a new system that would help workers – a compromise whereby workers traded their (already limited) rights to go to court over work-related injuries for a system where they would no longer have to prove the employer was at fault for their injuries, a "no-fault" system that would provide automatic compensation for workplace injuries within certain limits. The theory was one of social efficiency - that the cost of injuries should be borne by the manufacturers rather than the worker, the worker's family or the government." A. Widman, Workers' Compensation A Cautionary Tale, p. 4 (2006). By 1949, every state had

passed new workers' compensation law, which created a system of compensation for injuries that did not allow going to court. Hammond and Kniesner, "The Law and Economics of Worker's Compensation," Rand Institute for Civil Justice, 1980.

The recent spate of legislation concentrates on lowering benefits, narrowing eligibility requirements, and putting medical treatment decisions in the hands of the insurance companies. According to Jim Ellenberger at the AFL-CIO's Department of Occupational Safety & Health, all "reform" campaigns sponsored by the insurance industry share the following criteria: insurance company control over the choice of physician; reliance on the more restrictive American Medical Association's Guides to the Evaluation of Permanent Impairment in order to rate injuries – a guide that was not written for this purpose and does not control for particulars of an injury; narrowing the definition of what qualifies as a condition eligible for compensation; much stricter criteria for "proving" a workplace injury; restrictions on attorney's fees; and restrictions on amount and duration of benefits received. See Jay Causey, "Worker's Compensation at the Turn of the Century," July 2000, available on-line at http://www.causeylaw.com/home.php?content=pub6.

Some specific ways the no-fault standard has been turned on its head are: requiring that work be more than 50 percent of the cause of the injury or illness; requiring that work be a "substantial contributing cause," or "major contributing cause" of the injury; requiring that an occupational injury or disease is "clearly work related" and "a substantial factor in the cause of" the resulting disability; and raising the standard of causation where there are preexisting conditions. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 792-93, n. 572-578 (1998).

Statutory compensation law provides a number of advantages to both workers and employers. A schedule is drawn out to stipulate the amounts and forms of compensation a worker is entitled to if she or he has sustained given kinds of injuries. Employers buy insurance against such occurrences. However, the specific form of the statutory compensation scheme may provide detriments. Statutory schemes often award a set amount based on the types of injury. These payments are based on the ability of the worker to find employment in a partial capacity: a worker who has lost an arm can still find work as a proportion of a fully-able person. This does not account for the difficulty in finding work suiting disability. When employers are required to put injured staff on "light-duties" the employer may simply state that no light duty work exists, and sack the worker as unable to fulfill specified duties. When new forms of workplace injury are discovered, for instance: stress, repetitive strain injury, silicosis; the law often lags behind actual injury and offers no suitable compensation, forcing the employer and worker back to the courts. Finally, caps on the value of disabilities may not reflect the total cost of providing for a disabled worker. The government may legislate the value of total spinal incapacity at far below the amount required to keep a worker in reasonable living conditions for the remainder of his life.

The United States workers' compensation system places the cost of work related injuries on a particular class of consumers, and thus there exists a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product. "In the United States it is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture." 1-1 Larson's Workers' Compensation Law § 1.04.

"An integral and important part of the benefit scheme of all compensation acts is the provision of hospital and medical benefits. These benefits account for about 45 percent of the total benefits paid to injured workers. In forty-five states, District of Columbia and Puerto Rico, and under the Longshore and Harbor Workers' Act, and the Federal Employees' Compensation Act, such benefits are unlimited as to duration and amount. It is interesting to observe that in the space of about forty years the number of states providing full medical coverage has risen from about a dozen to almost four times that number. This appears to evince agreement with the finding of an authoritative study that 'it is impossible fully to relieve pain and to assure restoration of seriously disabled persons when medical care is arbitrarily limited. Equally important is the convincing evidence that unlimited medical benefits are economically the soundest benefit; that over the long term, they become the least expensive.'" 5-94 Larson's Workers' Compensation Law § 94.01 (citations omitted).

It is clear that workers who are permanently disabled are not getting enough compensation and the compensation duration is too short. Data consistently shows that a worker injured at the workplace earns significantly less than before the injury, even after returning to work. For example, according to one Rand Institute for Civil Justice Study, "permanent partial disability claimants injured in 1991-1992 [in California] received approximately 40 percent less in earnings over the four to five years following their injuries than did their uninjured counterparts." Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. Moreover, "for workers with minor disabilities, benefits replace a small fraction of lost wages." An earlier Rand ICJ report, released in 1991 found that "injured workers recovered a lower percentage of their accident costs than all accident victims

(54.1%) and that workers' compensation only compensated about 30% of the costs of long-term disabilities from work accidents." Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. If an injured worker is unable to find suitable work at all, the results are even worse because wage loss continues, yet many benefits run out. The system simply does not work for the permanently disabled. 50 Rutgers L. Rev. 657, 699 (1998) n. 156, 157 (citing Deborah R. Hensler et al., Comensation for Accidental Injuries In the United States 107 fig. 4.8 (1991). "This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the worker." *New York Cent. R.R. v. White*, 243 U.S. 188, 200 (1917).

"[D]ecisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of a worker arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one worker for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." *Arizona Employers' Liability Cases*, 250 U.S. 400, 419 - 20 (1919). Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of workers and their dependents to compensation for disabling injuries and death caused by accident in certain hazardous occupations, was held not to work a denial of due process in rendering the employer liable irrespective of the doctrines of negligence, contrib-

utory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the worker or his dependents of the higher damages which, in some cases, might be rendered under these doctrines. *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." *Ward & Gow v. Krinsky*, 259 U.S. 503, 520 (1922).

Likewise, an act which allowed an injured worker an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law. *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919).

The American Insurance Association proudly announces on its web site: "AIA has provided leadership in efforts to achieve reforms in workers' compensation programs in 30 states since 1992. While AIA is encouraged by the recent improvement . . . in the workers' compensation line, we recognize the need for ongoing involvement in workers' compensation reform and system administration. AIA is working to resist efforts to undermine reforms through legislative proposals or ballot initiatives." Reform through legislative efforts further diminishes the injured worker's right to justice. To diminish these rights further through erosion of the right of recovery against third party foreign defendants, would erode the *quid pro quo* bargain further and leave the injured worker without complete justice. Therefore, holding that the exercise of specific jurisdiction over foreign defendants, who place defective products in the stream of commerce is proper, would absolutely comport with fair play

and substantial justice, and would provide a more perfect remedy for injured workers, employers, insurance companies, and ultimately the United States consumers.

D. FULL FAITH AND CREDIT UNIFIES THE LEGAL REMEDIES

The purpose of the Full Faith and Credit Clause was to eliminate conflicts between States by requiring them to honor one another's judgments. Recognizing such exceptions would allow one State to substitute its judgment for that of the rendering State, contrary to the clear command of Article IV, Section 1 and 28 U.S.C. § 1738 that "Full" faith and credit be given state court judgments. The Full Faith and Credit Clause was a critical component of the Constitution's plan to transform the States from independent sovereigns into a unified nation. The Clause was to be a nationally unifying force "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935).

The Full Faith and Credit Clause provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Constitution ensured that the Full Faith and Credit Clause would receive uniform application among the States — a point that James Madison emphasized. See THE FEDERALIST NO. 42 (Madison).

This Court by holding that purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also creates specific jurisdiction in a state in which the harm occurs as a result of purposeful availment of the national market, would assure that every foreign defendant will receive uniform application of the law among the States and be treated in the same manner and to the same requirements of manufacturers in the United States. Furthermore, it will even the playing field between the United States manufacturers and the foreign manufactures as to liability for defective products and afford recognition and uniform application of the legal remedies to an injured worker due to the defective product.

E. DUE PROCESS REQUIRES A LEVEL PLAYING FIELD FOR ALL MANUFACTURERS OF DEFECTIVE PRODUCTS

At the time of the Constitution, sovereign States unquestionably enjoyed immunity for their ministers in the courts of foreign States. See Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819, 821 (1999) ("In 1789, the word 'State' denoted an independent country that possessed complete or a significant degree of sovereignty."). In *Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), the Court recognized that sovereign States had territorial jurisdiction over foreign sovereigns and their ministers, but mutually waived that jurisdiction in furtherance of their mutual interest and intercourse.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in

> which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137; See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country"). Specifically with regard to ministers representing a Sovereign in a foreign State, the Court meticulously delineated the reasons for their immunity.

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.

Schooner Exchange, 11 U.S. at 138-139. Thereafter, the Full Faith and Credit Clause transformed the respect that a forum state must show the sovereignty interests of other states from a matter of comity into a constitutional mandate. A specific provision of the Constitution speaks to whether a forum State must honor the sovereignty interests of other States. The Full Faith and Credit Clause altered the basis under which forum States had waived their absolute territorial jurisdiction over the sovereignty interests of other States, requiring respect both for their "public Acts" and "judicial proceedings." Art. IV, § 1. The Clause set in constitutional stone their mutual commitment to treat each other as coequals in a cooperative federal system. That mutual commitment transformed the

obligation to give full faith and credit from a matter of comity into a constitutional imperative. Justice Scalia emphasized that with the Full Faith and Credit Clause a constitutional mandate had replaced the comity formerly granted under international practice.

The Court initially required forum States to credit other States' laws based on territorialist choice-of-law principles. See *Bradford Electric Light & Power Co. v. Clapper*, 286 U.S. 145 (1932). It then moved to a balancing of interests test which it subsequently abandoned in favor of the current rule that allows the forum State the presumptive right to apply its own law as long as it had sufficient contacts with the case. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) ("the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) ("the Court has since abandoned the weighing-of-interests requirement.").

It is well settled that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (opinion of the Court by Frankfurter, J.) (denying Full Faith and Credit because "those not parties to a litigation ought not to be foreclosed by the interested actions of others"); Restatement (Second) of Conflict of Laws § 104 (1969) ("A

judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

However, personal jurisdiction complies with due process when the nonresident defendant has purposefully established minimum contacts with the forum state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). There should be no territorial limits on the power of the states to exercise adjudicatory jurisdiction. Therefore, foreign defendants should be held to the same standard of liability and responsibility for defective products as their domestic counterparts. Jurisdictional forbearance would preclude the injured worker from bringing the foreign defendants to justice in the jurisdiction where the harm occurs. It is the right of every worker to have equal access to justice in these United States.

CONCLUSION

It is inevitable, in this age of internationalization of commerce, that workers who work in the United States will be exposed to harm by defective products. When a worker is harmed by defective products in the workplace, the worker, the employer, the insurance carrier, and ultimately the consumer will prevail when an injured worker is able to bring an action against the foreign defendant who placed the defective product in the stream of commerce in the United States. An injury is reasonably foreseeable. A law suit is reasonably foreseeable. Personal jurisdiction is fundamental and quintessential to satisfy the rights afforded the citizens of the United States under the United States Constitution. To fail to so find offends all notions of equity and justice. For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted.

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